A Normative Approach to State Secession: In Search of a Legitimate Right to Secede

Jentley Lenong

Thesis presented in fulfilment of the requirements for the degree of Master of Laws at Stellenbosch University

Supervisor: Prof EAB Rudman

December 2013

Declaration

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Signature:

Date: 30 October 2013

Summary

Secession is one of the oldest and probably more controversial themes of public international law. The potential of a right to secede draws even more controversy amongst international law scholars and lawyers alike. This research merges classical international law perspectives on secession and the right to secede in particular, within a contemporary setting. Two research questions are answered: (i) Does a legitimate right to state secession exist under contemporary international law; if so, what are its normative characteristics? (ii) What is the position of the International Court of Justice (ICJ) in the realisation of a legitimate right to secede, considering its opinion in the *Kosovo-case*?

The work follows a normative methodological approach in tackling and presenting the arguments towards and against the legitimacy of the right to secede. This allows for a clear interrogation of the norms constituting classic international law against the realities of an evolving pedagogy. Classical international law is traditionally state-centred, primarily due to the 1648 legacy of the Treaty (Peace) of Westphalia. However, contemporary international law has come to incorporate the roles of non-state actors and even individuals. Consequently, the impact of secession extends beyond traditional international law norms like; territorial integrity and sovereignty, nationalism and uti possidetis. Moving forward, a critical inclusion within modern conceptualisation of secession needs to be considerations like, the right to self-determination and the promotion of human rights.

The research departs with a clear comprehension of the status quo of a general theory of secession. The identification of a prescriptive general theory of secession remains rather elusive. However, cogent arguments are presented for the establishment of a right to secede with a sufficient legal foundation to support a general theory and find effective enforcement for the right.

The arguments for the right to secede are rooted within a sound conceptual framework and historical context. In dealing with the normative characteristics of the right to secede, the historic reasoning of Shaw is utilised in order to establish a legal process for secession. This reasoning is applied in the presentation of the municipal manifestation of the right to secede, which traditionally is found in the constitutional entrenchments of the right. The relationship between the right to secede and self-determination is presented through a balancing of the components that constitute the right to self-determination. Following the Canadian Supreme Court's contribution on the right to self-determination in the *Quebec-case*, the aspirations of peoples for self-determination needs to follow this dual view of self-determination as consisting of the right to internal and external self-determination.

The contemporary position of the right to secede under international law is best illustrated in the ICJ treatment of secession in its *Kosovo Opinion*. The focus here is

to present new insights into the impact of unilateralism and multilateralism in the interaction with secession. Ultimately, this research in its normative methodological approach presents the arguments both ancient and contemporary for the legitimate potential of a right to secede.

Opsomming

In die internationale reg, is sessessie (afskeiding) sekerlik een van die meer kontroversiële temas. Binne die geledere van akademici en praktisyns veroorsaak die moontlikheid van ‘n reg tot afskeiding selfs meer onenigheid. Met hierdie navorsing word die klassieke sienings hieroor in die internationale reg saamgesnoer binne ‘n meer hedendaagse uitleg. Twee navorsingsvrae word beantwoord: (i) Bestaan daar ‘n legitieme reg vir staatsafskeiding binne die hendendaagse internationale reg en indien wel wat is die normatiewe karaktereienskappe van so ‘n reg? (ii) Wat is die stand van die Internationale hof vir Geregtigheid (ICJ) aangaande die verwesinliking van ‘n legitieme reg op afskeiding in die lig van die hof se uitspraak in die *Kosovo-Opinie*.

Die navorsing volg ‘n normatiewe metodologiese benadering om die argumente teen asook vir die legitieme reg op afskeiding te voer. Dit skep ruimte vir ‘n duidelike bevraagtekening van die klassieke internationale regsnorme teen die agtergrond van ‘n transformerende pedagogie. Die klassieke internationale reg is kenmerkend staatsgeorienteerd, grootendeels as gevolg van die nalatingskap van die 1648 Verdrag (Vrede) van Westphalia. Tog gee hedendaagse internasionale reg erkening aan die handelinge van nie-regeringsentiteite en selfs individue. Gevolglik, strek die impak van sessessie heel verder as tradisionele internasionale regsnorme soos; territoriale integriteit en soewereiniteit, nasionalisme en uti possidetis. 'n Kritiese blik op die moderne begrip van sessessie moet oorwegings soos die reg op selfbeskikking en die bevordering van menseregte in ag neem om vooriutgang te bewerkstellig.

Die navorsing begin met 'n duidelike begrip van die status quo insake 'n algemene teorie van sessessie. Die identifisering van 'n voorskriftelike algemene teorie van afskeiding bly ongelukkig ontwykend. Tog word oortuigende argumente vir die vestiging van 'n reg om af te skei gevoer. Dit gaan gepaard met 'n voldoende regsgrondslag wat 'n algemene teorie ondersteun, asook die moontlikheid vir die doeltreffende uitvoering van die reg.

Die argumente ter ondersteuning van die reg tot afskeiding word geïllustreer binne 'n verantwoordbare konseptuele raamwerk en historiese konteks. In die hantering van die normatiewe kenmerke van die reg word die klassieke redenasie van Shaw benut ten einde 'n regsproses vir afskeiding te vestig. Hierdie redenasie word toegepas by die handtering van voorbeelde oor plaaslike manifestasies van die reg to afskeiding. Hierdie plaaslike manifestasies word tradisioneel gevind binne state se grondwetlike erkennings van die reg. Die verhouding tussen die reg om af te skei en selfbeskikking word aangebied deur 'n balansering van die komponente waaruit die reg op selfbeskikking bestaan. Na aanleiding van die Kanadese Hooggeregshof se

bydrae tot die reg om selfbeskikking in die Quebec-saak, is die aspirasies van volkere vir selfbeskikking gevestig in die reg om interne en eksterne selfbeskikking.

Die kontemporêre posisie van die reg om af te skei ingevolge die internasionale reg word goed geïllustreer in die Wêreldhof se behandeling van afskeiding in die *Kosovo-Opinie*. Die fokus hier is die uitleg van nuwe insig oor die mag van unilateralisme en multilateralisme in die interaksies oor sessessie. Ten slotte bied hierdie navorsing in sy normatiewe metodologiese benadering die argumente, beide antiek en kontemporêre, vir die legitieme potensiaal van 'n reg om af te skei.

For my family

(Liza, Hendrik, Marilyn, Wendy & Azania)

and Prof Annika for believing in my untested potential!

plus valet quod agitur quam quod simulate concipitur

Table of Contents

1 Introduction

1 1 Introduction

Legal uncertainty summarises the position of public international law on the question of secession. Contemporary international law presents neither a set of complete rules on the topic, nor a functional theory of secession. The impact of secession on effected communities is profound, and this necessitates a dedicated set of legal rules on the topic. At most, international law needs to build consensus on a theory of secession. Buchanan shares these sentiments in describing the process of secession as:

> [T]he oldest, most disturbing and profound, yet most necessary, human drama. There are few meaningful events in a human life that are not encompassed in its acts. An adequate theory of secession would be the application to the special case of the state of a much more general theory, if we could attain it.[1]

According to Buchanan, considerable difficulties persist in establishing an adequate general theory of secession. One difficulty is that each incident of secession brings with it unique challenges. In addition to this, the facts and conditions that precede secession in a given situation significantly differ between instances. All of this increasingly makes the formulation of a general theory of secession extremely difficult and perhaps improbable.

The research presented in this thesis aims to contribute to the field of public international law. The thesis investigates the subject of secession in general. This is towards establishing the potential of the existence and legitimacy of a right to secede. This chapter introduces the research problem and the rationale behind the study. What follows is a presentation of the research questions, the hypothesis, and

[1] A Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Westview Press 1991) 162.

the methodology that have guided the research. The chapter concludes with a layout of the chapters and a brief introduction of the leading ideas discussed within them. As indicated above, no general theory of secession exists, herein resides the introduction to the research problem.

1 2 Research Problem and Rationale

There is little agreement amongst scholars and international lawyers about the scope and content of a general theory of secession. This has led to inconsistencies in the approach to a theory on secession by international law scholars. Even the possibility of establishing a general theory is questionable, this, due to the nature of secession. Each instance of secession brings with it a distinctive legal and political situation. This attribute makes an attempt to construct the prescriptive character of a right to secede particularly challenging. Although certain jurisdictions have recognised the right to secede and included it, within their statutes, [2] the existence and operation of the right under international law remains contentious. One of the suggested causes of this could be that the prevailing theories of secession fixate on the morality of secession.[3] This has left the concept of secession severely underdeveloped. A theory or process of secession needs to be established, and analysed first before a legitimate right to secede can be discussed.

Further, the traditional view of international law seeks to maintain the status quo of all states, which makes the creation of a legal right to secede even more difficult. International law does not expressly prohibit the right to secede, however its doctrines are rooted in the Westphalian model of statehood plus an adherence to the principle of stability. This presents difficulties for the development of secession and the right to secede. Crawford states in defiance of the right to secede that:

> [T]here is no specific content to the so-called 'privilege', over and above the proposition that international law does not itself ultimately prohibit

[2] These states include Burma and most recently Ethiopia in 1994. See chapter 3 3 below for a full discussion.
[3] Buchanan, *Secession* (n 1).

> secession. To the contrary, if there is a privilege here – a legally recognised entitlement to act – it is the privilege of the metropolitan state to seek to maintain its territorial integrity by lawful means.[4]

Crawford's statement serves as proof of the traditional approach under international law. He re-affirms the Westphalian model by dismissing the potential of the right and basing it on the principle of territorial integrity in an effort to maintain the status quo. It maybe that part of the normative character of the right to secede would need to be consistent with traditional statehood. This would also have to include the promotion of regional stability to enjoy full application in international law. The research employs the right to self-determination to highlight the changing foundations of the traditional notions of statehood in international law. This development produces contradictions in international law. An example being the paradox present within the relationship between self-determination and the doctrine of uti possidetis. In this paradox, the right to self-determination is used as the norm to liberate peoples from colonial rule. Conversely, international law adopts the doctrine of uti possidetis within this process, which aims to limit the liberties which self-determination seeks to advance. International law allows both principles to operate simultaneously in contradictions of each other's commitment. This highlights the inconsistency in arguments that a right to secede cannot exist within international law, because of contradicts with existing principles.

In *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (hereinafter the *Kosovo Opinion*), [5] the International Court of Justice (hereinafter ICJ) missed an opportunity to bring clarity to the question of secession. The ICJ interpreted the question posed by the United Nations General Assembly (hereinafter UNGA) narrowly to limit the discussion on the matter of secession. This was the court's decision even though

[4] J Crawford, 'The Right to Self-determination in International Law: Its Development and Future' in P. Alston (ed.), *Peoples' Rights* (Oxford University Press 2001) 53.
[5] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Advisory Opinion) General List No 141 [2010] ICJ Rep.

both Serbia [6] and Kosovo acknowledged that secession was in question. The question of secession is seemingly a matter to be determined under international law. Primarily because secession directly affects legal personality, by having the potential of creating new subjects under international law. Under Article 36(1)(b) of the Statute of the ICJ[7], the court has the authority to adjudicate 'any question of international law'. The declaration of independence by the Provisional Institutions of Self-Government of Kosovo was by its own admission an ordinance of secession. The main opposing state, Serbia concurred that the declaration constituted an act of secession. This conduct clearly brought about a question of international law. Pursuant to the court's compulsory jurisdiction[8] under Article 36, it would have been acceptable to argue that it was well within its powers to address the question of secession. Hence, the approach of the ICJ is probed, and an analyse of the effect of the court's reasoning on the development of an internationally recognised right to secede, is conducted.

State secessionist movements have been present on the international arena since the times of the Peace of Westphalia. However, recent developments in Kosovo and the Sudans[9] as well as in the Middle East has brought renewed attention to the urgent need for a defined right to secede under international law. In addition to these recent developments, there are a number of state territories that over a prolonged period have been struggling with continued secession claims. Examples are Chechnya, the Caprivi Strip, Northern Cyprus, and Taiwan, just to mention a few. Consequently, the motive of the research is to try to determine the process of secession, and the conditions possibly underlying the right to secede. The approach

[6] Although Serbia conceded that Kosovo seceded from its territory, they submitted to the court that the secession was illegal. See, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, ICJ (Advisory Opinion) [2010] Written Statement of the Government of the Republic of Serbia < http://www.icj-cij.org/docket/files/141/15642.pdf> accessed 15 July 2010.

[7] Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1946, entered into force 24 October 1945).

[8] See *Aerial Incident of July 27 1955 Case (Israel v Bulgaria)* [1960] ICJ Rep 146; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America* (Merits) [1986] ICJ Rep 14, para 1.

[9] Southern Sudan become a sovereign state on the 10th of July 2011 and the United Nations Security Council on the 13th of July 2011 adopted Resolution 1999 (2011) without vote to admit the new Republic of Southern Sudan as a member state of the United Nations. Northern Sudan is still officially known as the Republic of Sudan.

is to evaluate the potential of a certain legal right to oversee the process of secession and its possible results.

The reasoning in this study is guided by the fact that secession is as much a historical problem as it is a contemporary one. It investigates and explores the historic conceptual contexts of state secession under international law with the belief that related doctrines and principles – such as nationalism, self-determination, territorial integrity and uti possidetis can help establish the contemporary legitimacy of a right to secede. As indicated above, this issue of secession is problematic, not only the concept of secession, but also its consequences, particularly with regard to issues relating to succession.[10] Consequently, two problems present themselves. Firstly, international law is unclear, in terms of the legal status of secession. Attempting to determine the normative nature of a positive right to secede seeks to address this initial problem. Secondly, the ICJ, the most influential exponent and enforcement body of international law, seems reluctant to be drawn into pronouncing on the matter. This is a preliminary conclusion based on the reasoning of the court in the Kosovo Opinion. This research will also reflect on the question, what are the implications of the court's decision in this regard for a positive legal right to secede, if any.

The issue of state secession is complex and politically charged. Even though, the majority of states has recognised the right to self-determination through the adoption of international instruments recognising the norm, few are in support of a definite right to secede.[11] This may be because of sentiments that a right to secede may potentially threaten their immediate sovereignty and territorial integrity. However, even within this international climate, the right to self-determination has developed from a mechanism employed to emancipate former colonial peoples into a peremptory norm of international law. The objective of the research is additionally, to

[10] One of the main problems which faces peoples after deciding to secede and form a new state is the issues of succession. In general see J. Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007) and *Alisic and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The Former Yugoslavia Republic of Macedonia"* Judgement (Merits) No. 60642/08 ECHR.

[11] This is clear from the written submission by different states in the *Kosovo case* (n 4). See further: www.icj-cij.org.

determine the legal qualifications of the right to self-determination and to demonstrate how this could potentially affect the existence of a legitimate right to secede. This rationale contributed in the formulation of the research questions as discussed below. In addition, it has also directed the research project towards practical conclusions on the legal questions surrounding secession.

1 3 Research Question and Hypothesis

The research problems as discussed above produced the following research questions:

- Firstly, does a legitimate right to state secession exist under contemporary international law; if so what are its normative characteristics?

- Secondly, what is the position of the ICJ in the realisation of a legitimate right to secede considering its decision in the Kosovo Opinion?

Secession has a profound impact on legal personality under international indicated by Buchanan above.[12] Consequently, international law provides the most effective and appropriate platform for addressing the issue of secession. The research departs from the notion that international law is the appropriate area of law to address the question of the normative character of a legitimate right to secede. The right to secede has been incorporated into individual national jurisdictions[13] and the inquiry uses these examples to inform a potential legitimate right to secede under international law. Secession has the potential to lead to the breakup of the territory of a state. In this regard, it must be clear that secession cannot be equated with a revolutionary change. A revolutionary change seeks to challenge the legitimacy of the state in total, whereas a secessionist movement only challenges the state legitimacy over their group and the occupied territory they wish to claim. The right to secede is therefore intimately related to the group claiming the right and essentially

[12] Buchanan, *Secession* (n 1).
[13] (n 2) supra. The basis of this hypothesis is that a few national jurisdictions have recognised the right within their domestic legislation. It is within the scope of international law that the legitimacy of the right to secede has not been tested. This research is aiming to find the right's status under contemporary international law.

their connection to the territory. Buchanan remarks that 'To claim the right to secede is to challenge the state's own conception of what its boundaries are'.[14] This indicates the imposition of secession on fundamental characters of statehood - this being sovereignty and territorial integrity.

1 4 Methodology

The sources of international law, as presented under Article 38 of the Statute of the ICJ, informs the methodology of this research. These include primary sources, like international conventions and treaties as well as customary international law. The subsidiary sources consulted relates to international doctrines and international judicial judgements and opinions. In addition, the thesis draws on the leading literature on secession to bring these disparate sources together. It relies heavily on the works of leading authors in this field, such as Buchanan, [15] Macedo, [16] Higgins[17] and Weller[18]. As mentioned above, even though the secondary sources have guided the research, the primary legal sources remain decisive within the reasoning behind the main ideas.

The research problems, as discussed above, have guided and informed the approach to the different sources. Although secession is a legal concept, the theme of secession has a strong socio-political undercurrent. However, the quest to develop the concept of secession into a right, provides the legal character of the research. A legal positivist analysis informs the approach to discern a right. This is characterised by the isolation of legal attributes that underpin, confirm or dispute the proposed right. This further qualifies the range of legal sources utilised.

The approach of extorting a right out of a legal concept requires the use of primary sources to promote the rights resulting legitimacy. A legal methodological approach recognises that secondary sources does not affect the legitimacy of a right as

[14] Buchanan, *Secession* (n 1) 11.
[15] ibid.
[16] S Macedo and A Buchanan, *Secession and Self-determination* (New York University Press 2003).
[17] R Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (vol. 2, Oxford University Press 2009).
[18] M Weller, *Escaping the Self-determination Trap* (Martinus Nijhoff Publishers 2008).

significantly as primary sources. Secondary sources are still pertinent and find application especially in guiding legal interpretation. These sources allow for developments into concepts that are commonly present within the fields of the social and political sciences. The conceptual framework presented under chapter 2 outlines these developments and related considerations.

The research furthermore employs a historical legal analysis of state secession and its development within the boundaries of international law. Although reference is made to political and philosophical theories, comparable to state secession[19], the focus of the inquiry remains legal and other theories provides a holistic perspective and context. Any legal authority outside the field of public international law will be of persuasive nature only.

As indicated above, the motive of the study is to satisfy an aspiration for legal certainty, especially relating to the defined right to secede. This exercise identifies three areas of investigation. Firstly, the municipal manifestation and application of the right to secede; secondly, the legal relationship between the rights to secede and self-determination; and finally, the impact of unilateralism in the application of the right to secede; in light of the approach adopted by the ICJ in the Kosovo Opinion. These areas of research inform the chapter layout of the research. Below follows a brief synopsis of the content of these chapters.

1 5 Overview of Chapters

Chapter 2 commences with a discussion of the historical development of secession. This historic context encompasses a synopsis on the experience of secession. This briefly covers the pre-World War I period through to the decolonisation period. A discussion of the contemporary situation of secession under the various theories of secession follows. The aim of the chapter is to examine and challenge the traditional

[19] Such as the morality of state secession and the presence of national interest when it comes to the question of recognition of a seceding state.

understanding of statehood as a point of departure for the further discussions on the concept of secession.

The contemporarily perspectives of statehood in international law remains the product of the Peace of Westphalia treaties of 1648. Inquiries by international judicial institutions have consistently reverted to this position as the start of the inquiry into state practice.[20] This inquiry produces what this study terms the 'principle of stability' in international law. This principle is a recurring theme within international law jurisprudence. The principle of stability proposes the continuation of the status quo and to apply international law with as few as possible disruptions. The principle finds implied application in international doctrine, practice and judicial decisions.[21] The investigation into the theories of secession precedes the undertaking to establish a definition of secession. The primary purpose of this investigation is to settle on a workable definition of secession that can benefit the rest of the research. The different theories of secession lay the foundation for the analysing of an appropriate definition for secession.

Further chapter 2 demarcates the framework of concepts that characterize an understanding of the nation-state, territory and peoples' identity. The chapter justifies a brief inquiry into the multi-national and ethnically diverse state on the bases that secession is more likely in such a context than a traditional homogenise state. In the context of the Socialist Federal Republic of Yugoslavia (hereinafter SFRY), the ICJ also recognised the role of nationalism in the dissolution of the federation. The court stated in the case, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*[22] that 'After almost ten years of economic crisis and the rise of nationalism within the

[20] *Right of Passage over Indian Territory* (Portugal v India) (Merits) [1960] ICJ Rep 6, dissenting opinion of Judge Fernandez [Translation] para 19; *Jaime Francisco Castillo-Petruzzi v Peru,* Judgment, Inter-American Court of Human Rights (4 September 1998), concurring opinion of Judge A.A. Cançado Trindade, para 6. See also *Miguel Castro Prison v Peru,* Judgement, Inter-American Court of Human Rights (2 August 2008) para 34.
[21] *See in general; Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Reports 6*; Sovereignty over Certain Frontier Land (Belgium v Netherlands)* (Order) General List No. 38 [1959] ICJ Rep.
[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* General List No. 91 [2007] ICJ Rep.

republics and growing tension between different ethnic and national groups, the SFRY began to break up'.[23] The right to secede will inevitable be influence by the above concepts, and this necessitates the inquiry.

Chapter 3 investigates the inclusion of the right to secede into municipal statutes. The research appreciates that the domestic manifestation of the right might hold significance for the development of the concept of secession under international law. The chapter accordingly analyses the rationale behind the codification of the right to secede. Based on the discussion on the theories of secession in chapter 2, it can be concluded that secession is a process and not an isolatable singular event. These lessons learned shapes the approach to assessing the codified right. Consequently, the operation of the right to secede needs to be interpreted within a process of secession. Three elements are identified as having an impact on the legal functionality of the codified right to secede. These elements as proposed by Shaw, represents the process of secession.[24] They are the legitimate claim, also the element of effective control and thirdly recognition. Chapter 3 evaluates each separately in relation to the rational of a codified right to secede.

Four jurisdictions that included the right to secede within their constitutions are analysed within the scope of this chapter. They are the Union of Soviet Socialist Republics (hereinafter the USSR), SFRY, the Union of Burma (also named Myanmar) and Ethiopia. These are not case studies as such but examples of real manifestations of the right to secede in municipal law. The codified right to secede is utilised in an attempt to assess Shaw's proposed process of secession. In observing the manner of drafting the right into these constitutions, the objective is to identify the right's ability to be functional within a legal system. The test for the right's legal functionality is limited to an inquiry into the substantive and procedural features of the right. The chapter concludes with the reasoning deduced from the Canadian Supreme Court case - *In Reference re Secession of Quebec* (hereinafter the *Quebec*

[23] ibid para 232.
[24] MN Shaw, *International Law* (5th edn, Cambridge University Press 2003) 444.

case), [25] from which a proposition is deduced to develop the process of secession. The proposition introduces the element of 'negotiation' into the process of secession. The chapter aims to demonstrate that this element is not foreign to international law, but forms part of the mandate of United Nations Charter (hereinafter UN Charter) under Article 33(1).

Chapter 4 analyses the right to self-determination with reference to its relationship with the secession and the right to secede. The development of the right to self-determination is identified as the most effective strategy for the right to secede to match towards full recognition under international law. The chapter argues that self-determination has essentially been an ambition of peoples since the early formations of states. This serves as the rationale for premising the moral authority of self-determination on the peoples' will. This entrenches self-determination further as a peoples' right. The right to self-determination consists of two different variations, the rights to internal and external self-determination. The recent Kosovo Opinion[26] confirms this position. It is only under external self-determination that the potential of secession realistically is possible. Access to external self-determination is subject to the denial of internal self-determination. This approach to self-determination only allows the possibility of 'remedial secession' and excludes secession as an expression of the will of peoples. Remedial secession could be interpreted as secession as a solution or remedy for cases of extreme suppression or denial of internal self-determination. The chapter accordingly analyses whether a related right to secede can emerge from such violations under international law.

For the right to secede to act as a recognised right in international law, it needs to be reconcilable with the predominant notions of international law. Consequently, the chapter approaches the right to secede from the perspective of indirect application under international law. The relationship of the right to secede it tested against three concepts of international law. These are territorial integrity, uti possidetis and a constitutional right to self-determination. The discussion in chapter 4 indicates that

[25] Reference re Secession of Quebec [1998] 2 S.C.R. 217
[26] *Kosovo case* (n 4) para 173.

these concepts are not absolute under international law. Consequently, they do not present a complete bar to secession. From the perspective of secession as a process, the right is more flexible and adaptable in establishing an argument towards its legitimacy.

The final substantive chapter, chapter 5 aims to answer the second research question. The research focuses on the perspective of the ICJ in the Kosovo Opinion primarily. The chapter interrogates potential answers through investigating the ICJ's position on secession. It argues that the decision of the ICJ not to pronounce on a right to secede is responsible for the continuance of the status quo of legal uncertainty. In the absence of multilateralism, the realisation of peoples' desire to secede is only possible through unilateral conduct. This forms the rationale of the inquiry into the role of unilateralism in relation to secession under international law. The perspective of unilateralism is limited to the context of a unilateral secession – secession without the cooperation of the dominant state.

The chapter furthermore interrogates the operation and status of the unilateral declaration of independence. The declaration seems to be the preferred mechanism to manage the process of external legal recognition for a seceding state. The legal relevance of the act of declaring independence must hold some value towards international law recognising the process as being secession. Further the chapter explores, under the umbrella of unilateralism, the concepts of remedial secession and the potential right to independence as presented by the ICJ in the Kosovo Opinion.[27] In conclusion, chapter 5 contrasts the findings on unilateralism with the concept of multilateralism.

Lastly, the concluding chapter presents the findings of this research. These findings accompany some recommendations on the topic. This chapter endeavours to present the conclusions on the application of two approaches that have

[27] *Kosovo case* (n 4) para 79.

characterised secession and the right to secede over the course of this study. The first is the traditional approach. This approach, as covered in chapter 2, focuses on the history of statehood and classic international law principles. These principles include territorial integrity, uti possidetis and my suggested principle of stability. This approach uses morality as the substantive justification for secession. Consequently, the morality of the reasons for secession forms the premise for its legitimacy. The second approach, which is my suggested approach, is the normative approach. The normative approach, as discussed in chapter 3, views secession as a developing legal concept. It considers secession as a process rather than an event. This approach develops the justification for secession from the moral substantive considerations exclusively, to include procedural considerations. The normative approach proposes a process of secession rather the a definition or theory. The elements of this process include a claim to secede, the establishment of effective control over a territory and recognition of a new entity under international law. The approach seeks to reconcile the question of secession with existing principles of international law. The normative approach aims to improve the traditional approach and enhance the legitimacy of secession and a right to secede.

1 6 Qualifications and Exclusions

The research aims to contribute to the body of work under international law. However, the nature of the theme of secession relates to overlapping knowledge fields such as the political and social sciences. The objective of the research is not to contribute to these disciplines. The purpose and benefit of the reference to relevant theories from these fields is limited to creating context for the benefit of the legal research.

Furthermore, in the use of the phrase ‘the right to secede or secession’; no assumption is made as to the nature of a functioning right existing under international law. Such an interpretation of secession would in any case render the research futile. The exercise is purely theoretical in order to assess the interaction between the relevant concepts. Further, the exclusion of a study of indigenous and

minority rights and peoples is intended. This research is primarily directed towards the nature of a right and its practical application challenges. The issue of indigenous and minority peoples is far too broad, and an inclusion here would not do it justice. Such an inclusion would also detract from the primary objectives of this research as presented in the research questions.

Furthermore, the use of the term unilateralism in chapter 4 is restricted to the context of unilateral secession. The intention is not to suggest a strong consideration of the concept as popularly used in the context of international humanitarian law or economic state practice. The intention is for a conservative interpretation, limited to the context of secession. The focus would be especially centred around the unilateral declaration of independence.

Lastly, the research does not intend to engage in a substantive case study of any state's situation with secession. Rather, a legal theoretical approach is followed and the focus is on the legal sources as listed under Article 38 of the ICJ statute. The use of examples relating to secession is only to highlight the operation of concepts or to provide context to an argument or position. International law remains heavily premised on the Westphalian model of establishing its legal subjects and this present a critical historical pinnacle for understanding statehood. The following chapter interrogates this background in the context of secession and maps the foundation for the relevant concepts.

2 The Historical Development and Conceptual Framework of Secession under International Law

2 1 Introduction

As discussed in the chapter 1, the legal concept of state secession remains unclear. Even more uncertain is the existence of the right to secede. Ando correctly remarks, that 'Generally speaking, both in theory and practice, the right to secede has seldom been admitted in recent times'.[28] This creates a problem of legal certainty under international law. An adherence to a predominantly Eurocentric model of statehood compounds this problem further. Harding and Lim argue that this model is entrenched in the system of international law dating back to the Peace of Westphalia.[29] Consequently, the conceptualisation of legal personality under international law has been frozen in time and is currently unable to demonstrate the ever-changing legal and political realities of states.

The primary objective of this chapter is to relate the historical contexts of secession with the concepts key to it. Furthermore, the traditional understanding of the nation-state is challenged in the context of fundamental international law principles. These include the right to self-determination, nationalism and the relationship between national identity and territory. It is necessary to note that the right to self-determination cannot be removed from both the historical and conceptual properties of secession. Self-determination potentially allows for access to the concept of secession. Chapter 4 below discusses whether and how self-determination informs the right to secede. A brief preliminarily discussion about the evolving nature of the

[28] N Ando, 'Secession or Independence – Self-Determination and Human Rights: A Japanese View of Three Basic Issues of International Law Concerning "Taiwan"' in M Arsanjani, J Cogan, R Sloane and S Wiessner, *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2011) 393.
[29] C Harding and C Lim, 'The Significance of Westphalia: An Archaeology of the International Legal Order' in C Harding and C Lim (eds), *Renegotiating Westphalia: Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (Martinus Nijhoff Publishers 1999) 1.

right to self-determination is also conducted. The intention is to establish a basis for the presentation of a normative right to secede.[30]

The point of departure is an attempt to document and interpret the historical and contemporary theories that inform the right to secede. A comparative analysis is conducted into theories such as the Remedial Rights Only Theory, the Primary Rights Theory, the Just Cause Theory and other relevant theories as proposed by different authors on this topic. A comprehensive definition of secession is pursued as the study follows the various characteristics of secession.

Finally, the relationship between nationalist identity and territory is investigated through a closer look at the doctrines that inform nationalism. Nationalism and nationalist aspirations could be considered one of the greatest threats to the existence of a right to secede. However, the desire for the nation state presents a paradox. In what I term the 'nation state paradox', the object of secessionist attempts is the equivalent to what they intend to establish - the unified nation state. Consequently, nationalism informs the conceptual reality of a right to secede. The inquiry into the relationship between nationalism and secession is undertaken in the context of the multi-national state and ethnic-culturally diverse people. The chapter explores the relationship between the right to secede and the multi-nationalist and ethnic-culturally diverse state, as concepts akin to secession.

2 2 A Historic Perspective on Secession

2 2 1 Pre – World War I

The conceptualisation of the original subjects of modern public international law, their scope and nature, is often depicted as originating in 1648 with the Peace

[30] The right to self-determination is comprehensively discussed in Chapter 3. It is consequently presumed that the link between a right to self-determination and secession is only notional, in order to elucidate a potential framework to construct a normative approach to a right to secede.

Treaties of Westphalia.[31] The Peace of Westphalia then concludes Europe's Thirty Year War,[32] which in reality were peace treaties between the Holy Roman Emperor, the King of France and their respective allies. Peace was declared after lengthy negotiations that culminated in a convention of states and the signing of two treaties.[33] These treaties entrenched the principle of the equal sovereign state and the idea of collective state agreements. The collective state agreement or treaty has become the supreme manner of resolving political and international law disputes. This forms the basis of the organising ideologies of statehood in modern public international law. These ideologies have remained overwhelmingly Eurocentric over the centuries up until the present. The notion that the Peace of Westphalia informs the understanding of modern public international law and its subjects are sometimes construed as a narrow view of international law. This notion is premised on the presumption that no other concept or practice of international law existed before the European establishment. Weeramantry disposes of this notion, with his research into the international law under Islamic nations.[34]

The disruption of the status quo and territorial instability commonly characterises secession. It could be argued that the trauma of the period before Westphalia; the cumulative effect of the Napoleonic War and the consequent two World Wars all contributed to the incorporation within international law two primary objectives. These are the maintenance of peace and stability and retaining the status quo.[35] In the *Temple of Preah Vihear case*,[36] the court held that it was in the interest of

[31] D Harris, *Cases and Materials on International Law* (6th edn, Sweet & Maxwell 2004) 15-16.
[32] This war raged on between the periods 1618 to 1648. The basis of this war was primarily, the mass export and entrenchment of religious dominance over all foreign territories. This was also the justification for the majority of Europe's wars in the preceding century.
[33] Negotiations dragged on from 1644 till 1648, the two treaties were respectively concluded by the Roman Emperor, princes of Europe and France in Münster and by Sweden in Osnabrück on 24 October 1648. Noteworthy in relation to the emergence of new states, was the recognition of the United Provinces of the Netherlands whose independence from Spain was formally recognised via the Treaty of Osnabrück.
[34] C Weeramantry, *Islamic Jurisprudence: An International Perspective* (Macmillan 1988) 149. I will not engage this topic, but it is important to note that other forms of what can be termed international law existed outside of Europe. However, this research is cultivated in modern perspectives of international law and the European legal origin is dominant and consequently is followed.
[35] This position is evident in the development and promotion of a principle such as *uti possidetis*. See *Sovereignty over Certain Frontier Land (Belgium v Netherlands)* (Order) General List No. 38 [1959] ICJ Rep, 554.
[36] *Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6.

stability that the original error in relation to demarcation of boundaries was rendered irrelevant.[37] The ICJ held that 'In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality'.[38] In commenting on the *Case Concerning Sovereignty over Certain Frontier Land* (hereinafter the *Frontier Land case*),[39] Castellino and Allen state that 'This case is instructive since it addressed issues of status quo and territory without invoking the doctrine of uti possidetis'.[40] They acknowledge that the wave of decolonisation, and the doctrine of self-determination did not have any significant effect on the judgment and the parties did not evoke this. However, they concluded that the case 'provides an interesting perspective of the motives of the court and an indicator of the value of stability as perceived by the judges'.[41] The position of the ICJ reflects the difficulty of exercising the right to secede, where it threatens both the political[42] and legal stability of a territory.

As indicated above, contemporary public international law still primarily reflects the heritage of the treaties of Westphalia. This hypothesis will be termed the Westphalian model. The idea of the centrality of the sovereign state as an actor in international law is still primary even after recent shifts in the influence of the players. As an example, this model neglects the status and influence of non-state actors. In what Harding terms the 'Westphalian paradigm'[43] the concept of equal sovereign states, is further explored. Cassese, who Harding also refers to, positions him closer to legal theory in labelling it the 'Westphalian order'.[44] According to Harding, the Westphalian paradigm concerns itself with equal and sovereign states as the primary and original actors under international law. Only a state can provide legal personality

[37] ibid 34.
[38] ibid.
[39] *Sovereignty over Certain Frontier Land (Belgium v Netherlands)* (Order) General List No. 38 [1959] ICJ Rep.
[40] J Castellino, S Allen and J Gilbert, *Title to Territory in International Law: A Temporal Analysis* (Ashgate Publishing 2003) 124.
[41] ibid.
[42] Harding, 'The Significance of Westphalia' (n 29) 5. Here the authors argue that it is a perspective favoured by governments for promoting political stability in presenting this Westphalian logic as a rigid and conservative structure.
[43] ibid 1-23.
[44] Harding, 'The Significance of Westphalia' (n 29) 5. Cassese presents this concept as the period around the Peace of Westphalia that illuminates a dividing line between tradition international law views and the modern body of international law governing sovereign and independent states.

to entities legally within its territory. These would include non-governmental organisations or even private individuals. The non-state actors acquire a derivative personality, which existence and legitimacy are subject to the will of the originating state. This perspective can be criticised for being arcade and not incorporating the proliferation of many politically strong multi- and transnational corporations and organisations. Some of these organisations possess economic power that far exceeds that of a majority of the world's governments. The secession debate cannot be void of these considerations. Harding and Lim quote Haufler where she states that:

> [M]uch of the current research slights the role of corporations and non-governmental organisations, and concentrates on the decisions of state policy-makers. By doing so, it misses the important contribution of non-state actors to the creation and maintenance of regimes (...) Private sector actors may construct independent national regimes, or play a relatively equal role with states within a regime of 'mixed parentage'.[45]

What the Westphalian model lacks is the role of these non-state actors in the maintenance and development of the system of international law. This argument illustrates how this historic system of international law fails to recognise the changes within it. With the use of the term Westphalian paradigm, Harding argues for the demise of the paradigm, but intrinsically also argues for a 'shift' in contemporary international law.[46] The inequalities of the current international law order, predicated by this central notion of equal sovereign states, bear little rational or logic in an ever changing system. The pure adherence to the logic presented by the Westphalian model serves as a permanent bar to the accommodation of a legitimate right to secede under international law. With the construction of a normative framework for the exercise of the right to secede, the principle of stability needs to be accommodated, even though secession carries the potential of disrupting the status quo.

[45] ibid.
[46] ibid 15. Harding and Lim argues that during the period of Westphalia there existed nothing which can in the current context be called international law, he proffers that the players and the game of international law has changed, as well as increased participation of non-state actor in the process of norm creation.

History reflects a shift in the subjects of international law and this should inform the development of the concept of secession. Especially, in its potential as a solution to territorial disputes. The nation state paradox deepens the viability of secession as a solution to international territorial disputes. This paradox is where, secessionist seek to form a new territorial entity under the same system that protects and affirms the territorial integrity of the state which they want to disrupt. The current system of international law, premised on the rationale of the Westphalian model, seems opposed to secession. This situation continues primarily because the traditional system of international has not been harmonised with concepts that at first instance seems to threaten state territorial integrity. The secessionist movement needs the tradition institutions of statehood to be disrupted in order to forward their cause. However, in order to achieve success, a return to the traditional institution is necessary. Herein lays the paradox. The position of the ICJ in adjudicating territorial disputes has also favoured the principle of stability as discussed above, and a right to secede consequently would have to incorporate such a consideration.[47]

2 2 2 Decolonisation

With the demise of colonial rule, decolonised territories were presented with three options. These were forming a new sovereign state; integrating under an existing state's control as a trust or non-self-governing territories or association with a sovereign state. It was under UNGA Resolution 1514[48] that official impetus was given to the process of decolonisation. UNGA Resolution 1514, in its preamble 'solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'. Dugard terms this the 'outlawing of colonialism'.[49] Post 1960, in the aftermath of Resolution 1514, the United Nations (hereinafter UN) saw an immediate proliferation of newly independent member states. Consequently, how did the decolonisation process affect international law and its relationship with secession. An appreciation for the developments

[47] *Temple of Preah Vihear case* (n 36) and the *Frontier Land Case* (n 39).
[48] The Declaration on the Granting of Independence to Colonial Countries and Peoples, (adopted 14 December 1960) GA res. 1514 (XV) (adopted by 89 votes to none; 9 abstentions).
[49] J Dugard, *International Law: A South African Perspective* (4rd edn, Juta 2005) 96.

surrounding the right to self-determination during this period is necessary in answering this question.[50]

Paragraph 2 of UNGA Resolution 1514 declares that, 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. Paragraph 6 then curtails this proclamation by qualifying it. The qualification aims to limit the right in declaring that:

> Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations.

It could be argued that this qualification is a direct bar to secession. It creates a dichotomy that serves firstly, to proclaim the superiority of territorial integrity over peoples' rights and secondly, to codify under international law the political doctrine of nationalism. The principle of stability as illustrated in the judgements of the ICJ[51] could also be said to inform this qualification of the right to self-determination.

UNGA Resolution 1514 was followed by UNGA Resolution 2625 (hereinafter the Declaration on Friendly Relations),[52] which further denounced colonialism and upheld the existence of the right to self-determination. The paragraph on Principles of Equal Rights and Self-Determination of Peoples, declares that:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign independent states

[50] The right to self-determination could independently constitute a right to secede. Reference here to self-determination is limited to the context of colonialism. It is prudent to ponder the question, whether the right to self-determination necessarily imply a right of secession? This question closely looked in Chapter 3. See also, Higgins, *Themes and Theories* (n 16) 968.
[51] (n 20) supra.
[52] The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (adopted 24 October 1970) GA res. 2625 (XXV).

> conducting themselves in compliance with the principles of equal rights and self-determination of peoples.

This is again a qualification of the right to self-determination and the same dichotomy as in UNGA Resolution 1514 presents itself. The conclusion is similar to that this presents a direct prohibition against secession. Seshagiri reflects on self-determination and colonialism, by highlighting a significant paradox. He states that:

> In particular, self-determination has been limited at international law to apply only to groups that constitute 'peoples' and whose territorial claims fit a particular colonial mould. In this manner, international law provided a limited window for colonized peoples to break free from their colonisers though not from colonially established borders.[53]

Seshagiri employs the paradox to argue in opposition to the principle of uti possidetis, in doing so, he highlights a significant fallacy of the process of decolonisation. The process aimed to liberate people, but only within the contours of the predetermined colonial borders. The decolonisation process did not considering the peoples' association with the territory.

The judicial decision in Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (hereinafter the *South West Africa case*),[54] serves as a significant example. Firstly, because the ICJ expressly declared that the principle of self-

[53] L Seshagiri, 'Democratic Disobedience: Re-conceiving Self-determination and Secession at International Law' (2010) 51 Harvard International Law Journal 567.

[54] *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16. The case concerned South Africa's refusal to vacate South West Africa (Namibia) after the United Nations Security Council revoked its mandate over the territory, primarily because South Africa was extending its policy of separate development (Apartheid) to this territory, which it held under a mandate originally in place of Britain. The court agreed with the UN Security Council Resolution and declared South Africa's presence in Namibia to be illegal in that it did not have the interest and development of the majority of the inhabitants of the territory at heart.

determination was applicable to all non-self-governing territories.[55] Secondly, the court found that when interpreting international law the court could not remain ignorant of subsequent developments in the law.[56] The ICJ went further to recognise that the concepts embodied in the Covenant of the League of Nations 'were not static, but were by definition evolutionary'.[57] This position strengthens the potential of a right to secede, where the developing nature of the law promotes the presences of such a right. In the *South West Africa case*, the ICJ limited the interpretation of the right to self-determination to have bearing only on the situation of peoples living under colonial rule and their emancipation from alien domination.

Regrettably, in just denouncing South Africa's behaviour and its control over South West Africa, the court missed an opportunity to declare the system of trusteeship and mandated territories in its precise nature as contrary to international law. The principle of equal sovereign states, as present within the Westphalian model was flouted by the introduction of these concepts to international law. The *South West Africa case* did however materially contribute to the establishment and development of the right to self-determination.

The *Western Sahara case* serves as a further example of Seshagiri's paradox. From the onset in the *Western Sahara case*, the court accepted that the right to self-determination had emerged as a norm of international law.[58] However, the court limited the right, to the colonial setting and non-self-governing territories[59] as was the case in the *South West Africa case* advisory opinion. The court emphasised the centrality of the principle of self-determination in international law, to the extent of its drafting into Article 1 of the UN Charter.[60] The ICJ was in favour of a normative approach, a responsibility that it attached to the UNGA. The court proclaimed, that

[55] ibid para 52.
[56] ibid para 53.
[57] ibid.
[58] ibid 12.
[59] ibid 121.
[60] ibid 54. Article 1, paragraph 2 states that the purpose of the United Nations is: 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples (...)' Article 55 also recognises the principle, however in the contexts of non-self governing territories.

'The right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized'.[61] The court pursued the reasoning that the legal and substantive question of self-determination had to be answered through the free and genuine expression of the will of the peoples of the territory. According to the court, the form and procedural question lays at the discretion of the UNGA.[62] The ICJ restricted the peoples will to only the substantive question of their self-determination. Higgins nevertheless believes that the issue of secession is detached from the aspiration of post-colonial self-determination. A complete reading of Higgins' perspectives indicates that both colonial and post-colonial entitlements of peoples to self-determination are entirely irrelevant to the concept of secession.[63] The basis for Higgins' argument is the fact that peoples can secede without evoking a right of self-determination. Consequently, that secession does not exist as an exclusive remedy for the exercise of the right to self-determination.

If the ICJ's interpretation of self-determination according to the *South West Africa case* and the *Western Sahara case* is followed, it seems that a right to self-determination could not have survived the post-colonial era. There is contemporary jurisprudential support for such an opinion. The Canadian Supreme Court argued in the *Quebec case* that:

> International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g. the right of secession that arises in the exceptional situation of an oppressed or colonial people.[64]

[61] ibid 71.
[62] ibid.
[63] Higgins, *Themes and Theories* (n 16) 964-968.
[64] *Quebec case* (n 25) 112.

The Canadian Supreme Court seems to propose that a right of secession is an exception rather than a norm of international law. However, what is indispensable for the current research is the court's recognition of the right to secession in two instances – firstly, as a remedial right and secondly within the context of colonialism.

2 3 A Working Definition of Secession: Perspectives

2 3 1 Introduction

The primary objective of this sub-chapter is to lay the theoretical and analytical foundation for the rest of the study. The issues deliberated over in this section are reoccurs and inform the conceptual framework of the study. The normative character of a right to secede cannot become apparent without fully understanding what the concept of secession entails. An introductory exploration on the morality of secession leads the synopsis of the leading ideas on the theories of secession. The primary purpose is to extract a feasible definition of secession to guide the rest of the research. Bartkus also follows this approach in stating that:

> Critical to any specific secession is its own internal justification; of central importance to any study of secession crises are the moral issues concerning their justification. The analytical framework therefore rests on this normative bedrock underpinning secession.[65]

2 3 2 Theories of Secession

Legal theory requires a definite description of a legal concept for it to comply to with the principle of legal certainty. This rationale remains true for the concept of secession. Groarke explains that 'The law favours certainty and there is a legal and moral presumption in favour of the status quo'.[66] Seemingly, Groarke equates legal certainty with a presumption in favour of the principle of stability as discussed

[65] V Bartkus, *The Dynamic of Secession* (Cambridge University Press 1999) 8.
[66] P Groarke, *Dividing the State: Legitimacy, Secession and the Doctrine of Oppression* (Ashgate Publishing 2004) 149.

above.[67] A clear definition and theory of secession is critical in a study of this discourse. However, legal theorist and commentators seem to lack consensus on this imperative point of departure. The is diverging views on a definition and theory of secession which contributes to the difficulties in finding common denominators to define secession. A general theory of secession consequently becomes even more unimaginable. In addition to this, some authors, such as Radan argues that the existence of the right itself is contentious and that this within itself creates this lack in consensus.[68]

In interrogating the morality of secession, Buchanan suggests the existence of two predominant types of theories on secession.[69] The first is the Remedial Right Only Theory and the second is the Primary Right Theory.[70] According to Buchanan, all theories attached to secession can fundamentally be categorised and accommodated within his two-tier model. Buchanan's formulation of these theories seeks to establish the moral and legal justification for the existence of a right to unilateral secession.[71] In his formulation of the main characteristics of his theories, he approaches the matter pragmatically and uses unilateral secession as the premise for these theories.

His first theory - the Remedial Right Only Theory, argues that a right to secede arises to provide a remedy of last resort in cases of grave injustices and continuous gross human rights violation by state forces.[72] Buchanan suggests, that a right to

---

[67] (n 20) supra.
[68] P Radan, 'The Definition of 'Secession' (2007) 3 Macquarie Working Law Paper Series.
[69] A Buchanan, *Justice, Legitimacy, and Self-determination: Moral Foundations for International Law* (Oxford University Press 2003) 348.
[70] ibid 350 and A. Buchanan, 'The Making and Unmaking of Boundaries: What Liberalism Has to Say' in A Buchanan and M Moore (eds), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge University Press 2003) 246.
[71] It is important to note that a common mistake that scholars dealing with secession make in their criticism of Buchanan's two types of theories is to neglect to grasps that the conceptualisation is exclusively found within the discourse of liberalism. A carte blanche application or testing of these theories outside the realm of liberal theory will render the conclusion flawed. As an example, secession is not interrogated from within a monarchy system.
[72] It would be helpful to note even though I do not take up the matter here, that this was one of the arguments put to the International Court of Justice (ICJ) by the parties in their written submissions (see Germany's written submission) in the case - *Accordance with International Law of the Unilateral*

secede attaches to a group or peoples 'only when secession is the remedy of last resort in conditions in which that group is the victim of persistent violations of fundamental rights of its members'.[73] Buchanan further argues, that the violated rights are essential individual human rights. However, he does not exclude the possibility that a violation of the collective group rights may activate a remedial right to secede. In fact, he provides two circumstances of where a right to secede may be relied on, due to a collective group right being violated.[74] The firstly is where the dominant state provided the group (peoples) with autonomous status or particular rights and defaults on such a declaration. The other circumstance would be, where a disputed territory exists that was unjustly annexed, but was previously the independent territory of the group claiming the right.[75] In these circumstances secession serves to correct the injustice perpetrated against the group.[76] Both instances of either collective or individual rights activating the right to secede are reconcilable with the Remedial Right Only Theory.

The Primary Right Theory presents a more fundamentalist argument for a right to secede, compared to the Remedial Right Only Theory. This theory rejects the existence of an abhorrent injustice to access secession. The theory premises itself on the centrality of a primary right providing access to the secession. Buchanan concludes that there are two manifestations of this theory. He identifies them as the Plebiscitary Right Theory and the Ascriptive Right Theory.[77]

The Plebiscitary Right Theory holds that a right to secede is unilaterally available whenever a majority of people within a region or territory wishes to secede. This form of the Primary Right Theory has its critics and supporters. Views favouring the

---

Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, (Advisory Opinion) [2010]. ICJ Rep 403.

[73] Buchanan, 'The Making and Unmaking of Boundaries' (n 70) 247.

[74] Buchanan, *Justice* (n 69) 353.

[75] An example of this would be Eritrea's secession from Ethiopia. Italy colonised Eritrea and with the decolonisation process the people of Eritrea where incorporated into the Federation of Ethiopia. Consequently, their annexation to Ethiopia was a denial of their right to freely express their will as a people. See further JI Levitt (eds), *Africa: Mapping New Boundaries in International Law* (Hart Publishing 2010).

[76] Buchanan, 'The Making and Unmaking of Boundaries' (n 70) 248.

[77] ibid.

Plebiscitary Rights Theory, finds justification in 'the democratic value that government needs to be by consent and (...) that such a theory gives direct effect to the implications of the right to freedom of association'.[78] Buchanan criticises proponents of this theory as hiding behind appeals to the value of liberty and democracy.[79] The arguments forwarded by Buchanan, to substantiate the legitimacy of the Plebiscitary Right Theory, can neither be located as principles of democracy, nor can it be said that the discourse of democracy makes provision for it.

The second form of the Primary Right Theory is the Ascriptive Right Theory. This theory reserves a unilateral right to secede for peoples based on their common ascriptive characteristic. Ascriptive groups can be 'variously referred to as peoples, distinct peoples, encompassing cultures, or more commonly, nations'.[80] This theory is also commonly termed the nationalist theory.[81] The problem and criticism of this theory, is the question - what constitutes a nation? The philosophical theorists Avashai and Raz provide a cogent definition of this in that:

> A nation is a group united by an 'encompassing' common culture, membership in which is chiefly a matter of belonging, rather than achievement, where the group in question feels an attachment to a particular area (understood as a homeland), and where the group (or a substantial portion of its members) aspire for some form of political organization (though not necessarily full independent statehood).[82]

Groarke challenges the theories presented by Buchanan with his own. He focuses on a distinction between political and legal conceptualization on the legitimacy of secession. Groarke argues for the existence of two theories; the first is premised on the right to self-determination and the second is based on the notion of a just cause.[83] In relation to the first theory, Groarke argues that this right might appear to

[78] ibid 252.
[79] Buchanan, *Justice* (n 69) 373.
[80] ibid. 379.
[81] J Levitt (ed), *Africa: Mapping New Boundaries in International Law* (Hart Publishing 2008) 182.
[82] Buchanan, 'The Making and Unmaking of Boundaries' (n 70) 248.
[83] Groarke (n 66) 89.

be a group right, however, the right to self-determination and any corresponding right to secede can be traced back to being an individual right. Although Groarke does not elaborate on these individual rights, it could be assumed that it is rights that promote access to the right to self-determination. He admits a theory based on the right to self-determination is similar to Buchanan's Primary Rights Theory. In addition, he concludes that it would lead to a general or inherent right to secede.[84] However, Groarke follows a progressive approach by distinguishing between legal and political theories. Political discourse provides for the right, but its viability and application lies within legal theory. Buchanan does not make this distinction.

In proposing a legal theory of secession, Groarke suggests that three requirements need to be satisfied. Firstly, a legal theory should provide the means of determining when a right to secede would arise. Secondly, it should be pragmatic and provide the mechanism needed to exercise such a right and thirdly it should be able to identify the law that will provide the criteria needed to apply the right.[85] This approach potentially provides a test to analyse the normative characteristic of the right to secede. Groarke proposes, that there should be a legal presumption in favour of territorial integrity of existing states and that secession in this context should be a remedy rather than a substantive cause of action.[86] In this, Groarke tilts towards Buchanan's Remedial Right Only Theory. In his reliance on respect for territorial integrity, the influence of the tacit principle of stability is possibly an influence. There are similarities between Buchanan's Remedial Right Only Theory and Groarke's Just Cause Theory. Although these theories do not facilitate the establishment of a general theory of secession, they do create a platform towards defining secession. Consequently, it becomes vital to see how these theories assist in the formulation of a working definition on secession.

2 3 3 A Definition of Secession

[84] ibid.
[85] ibid 149.
[86] ibid. This seems to be the core of Groarke argument, as he leans heavily on the Remedial Rights Theory to find a moral basis to premise a legal theory of secession.

Although no generally accepted definition of secession exists, multiple scholars have worked on a definition. Radan for instance defines secession as 'the creation of a new State upon territory previously forming part of, or being a colonial entity of, an existing State'.[87] With this general definition Radan aims to set a broad platform to further categorise secession into five different types. Through this process, he attempts to accommodate a range of situations relating to secession.[88] His first type is colonial secession,[89] this is cases where colonial entities attain statehood. Radan provides for this type within his general definition. Secondly, he argues for unilateral secession, which he describes as a situation where 'notwithstanding the continued opposition of the host State, part of that State becomes a new State and the host State continues its existence'.[90] The next type is devolutionary secession. These are 'cases where, irrespective of whether or not it initially opposed the creation of a new State, the host State consented to the creation of a new State at the time of the latter's creation and the host State continues its existence'.[91] This type of secession seems to involve post facto consent. This needs to be distinguished from Radan's consensual secession that involves mutual consent. He argues that consensual secession involves 'cases where, the demand for the creation of a new State leads to the host State being dissolved by consent, leading to the creation of a new State or States'.[92] Finally, he suggests 'dissolving secession' which are 'cases where, the demand for the creation of a new State leads to the factual dissolution of the host State, leading to the creation of a new State or States'.[93] This type of secession seems to be a bit confusing with his consensual and devolutionary secession. However, possible Radan seeks to accommodate situations where external states forces the factual secession of a part of the state. Bangladesh's secession from Pakistan would be an example of such a type of secession, primarily because of India's involvement there.

[87] Radan (n 68) 2.
[88] ibid 15.
[89] ibid.
[90] ibid.
[91] ibid.
[92] ibid.
[93] ibid.

These different forms of secession presented by Radan seem to be extremely similar and closely related. The last four forms can be distinguished based on consent or unilateral conduct and are not truly distinct in any other regard. There remains controversy over whether the formation of a new state from under the cloak of colonial rule is truly secession. Higgins criticise the view that the process of decolonisation can be accommodative of the concept of secession. She unequivocally states that in her opinion:

> This is a singular use of the term 'secession'. 'Secession' implies leaving something behind. De-colonization (regardless of whether of jus cogens or not) implied that nothing should be left behind (...) Secession was not in issue in this context.[94]

Crawford goes on to define secession as 'the process by which a particular group seeks to separate itself from the state to which it belongs, and to create a new state on part of the territory of that state'.[95] He emphasises that according to international practice no unilateral right to secede is recognised.[96] However, Crawford treads cautiously in limiting his statement to prevailing international practice and not international law. He bases his opinion on the respect of the principle of territorial integrity and the legitimacy of the political systems of the state.[97] Unlike Radan, Crawford includes the continued existence of the host state in his definition.

In contrast, in writing on self-determination and human rights in Taiwan, Ando states that 'Secession means the separation of part of the territory of an existing state to form a new state or accede to another existing state'.[98] This is a new approach to defining secession, in that it seems to suggest that accession can form part of the process of secession. Accession in the context that Ando presents it could be

[94] Higgins, *Themes and Theories* (n 16) 968.
[95] J Crawford, 'Report by James Crawford: "State Practice and International Law in Relation to Unilateral Secession"' in A Bayefsky (ed) *Self-determination in International Law: Quebec and Lessons Learned* (Martinus Nijhoff Publishers 2000) 34.
[96] ibid 31.
[97] Crawford seeks legal certainty and dismisses the recorded cases of unilateral secession as being exceptions rather than a rule seemingly developing under international law. See ibid. 31-61.
[98] Ando (n 28) 392.

comprehended as entering into a free association with another state or even by integration with an independent state. Following Ando's definition would allow for more flexibility in a people's expression of their will to secede; a position that is not totally out of accord with international law. According to the provisions of UNGA Resolution 1541,[99] the process of exercising self-determination could produce three different outcomes for non-self-governing territories. Firstly, and judging from UN practice the most preferred option, is for a territory to become independent. Secondly, the territory can enter into a free association with an independent state; and lastly peoples can opt to integrate with an independent state.[100]

In summary, the theories and definitions of secession can be distinguished with regard to conservative and liberal views. Higgins suggest that secession implies leaving something behind. However, detaching the process of decolonisation from the term secession is only based on a pragmatic view of the concept of statehood. If a legal approach to the concept of statehood is followed, it cannot be denied that colonial entities formed integrated territories that formed part of the colonising dominant state. The theories forwarded on secession, above, are indicative of the cardinal point that secession is a process. Crawford includes this in his definition, which seems an apt inclusion to follow in determining a right of secession and its normative character

Higgins presents an extremely conservative view of a definition of secession. She refutes the potential of the colonial context having produce situations of secession. Ando represents the other extreme, which is a liberal view of secession. Ando's insertion of accession carries legal merit; it is an argument that is best illustrated within the contexts of the right to self-determination. There remains the general inclination that a definition needs to state that territory needs to be left behind. A right to secede would have to authorise an entitlement to part of a territory. There is an uneasiness with a definition which allows for taking all of a state's territory.

[99] Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter (adopted 15 December 1960) GA res. 1541 (XV).
[100] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12,para 57 and 58.

A workable definition of secession cannot be void of the theoretical foundation of secession. It is within this theoretical analysis explored above, that the moral justification for secession is presented. If Bartkus' view is considered,[101] that every case of secession possesses its own internal justification, than a pursuit of a definition of secession is possibly rendered null. The difficulty in determining consensus amongst scholars is that each one focuses their definition on a particular incident of secession. None attempts to find a general definition. However, even where Radan's approach is followed, to formulate an all-encompassing definition, the failure of such an approach is apparent, in that it ends up with different types of secession rather than a clear definition. Bartkus' position is possibly best suited to inform a conceptual understanding of secession. The theoretical outline above could help inform a comprehension of the moral justification of secession. This approach will be followed in the subsequent inquiry into nationalism as part of an analysis of the conceptual framework of secession.

2 4 Nationalism and Secession

2 4 1 National Identity and Territory

The right to self-determination is frequently upheld as the central justification of secessionist movements. The developed legal concept of the right to self-determination has its origins in ideologies such as nationalism and democracy.[102] Contemporary understanding of public international law is heavily predicated on the notion of the nation state.[103] The ideological foundations on which the move towards statehood and nationalism rest are the subscription to doctrines of unity.[104] These concepts form a platform for understanding state, territory and identity, they inform the prescriptive nature of a right to secede. To better understand secession, there is

[101] Bartkus (n 65).
[102] Shaw, *International Law* (n 24) 251.
[103] Higgins, *Themes and Theories* (n 16) 959.
[104] J Castellino, 'National Identity and the International Law of Self-determination: the Stratification of the Western Sahara 'Self'' in S Tierney (eds), *Accommodating National Identity: New Approaches in International and Domestic Law* (Kluwer Law International 2000) 258.

a need to comprehend nationalism. Buchanan best describes the importance of an inquiry into nationalism, where he states:

> [T]he distinction between federal and non-federal systems, the morality or immorality of nationalism – all of these issues and more are inescapable once we undertake to develop a normative theory of secession.[105]

Under colonial regimes, cultural identities of indigenous and minority groups were suppressed. The process of decolonisation saw diverse and formerly oppressed peoples thrown together under the flag of the nation-state. This process led to the creation of artificial forms of national identity, not linked to irredential characteristics. In addition, post-colonial instabilities and conflicts in especially Africa and South-America became indicative of the failure of this project. This could be as a result of former colonial peoples' rejection of this artificial national identity. This project consequently failed at its primary objective of forging a new national consciousness and the unity of former colonial peoples. However, with the retention of the colonial administrative borders to dictate the parameters of sovereignty and statehood under the principle of uti possidetis, the right to self-determination was also rendered largely artificial. The use and rationale of the uti possidetis principle was largely premised on the maintenance of international stability.[106] Subsequently, indigenous and minority ethnic-culturally diverse peoples were forcefully inducted into new states.

Castellino remarks that, after emancipation from colonial rule several governments depended on doctrines of unity to fight secessionism. These were doctrines such as statehood, nationality, and especially nation building. The latter was believed to provide a basis for the sustainability of the international order, akin to the

[105] Buchanan, *Secession* (n 1) 7.
[106] The artificial nature of the decolonisation process was premised on fact that it had no room for the rights of minorities or indigenous groups within the earmarked new states. The nation-state had to accommodate all groups of peoples within the territory and suppress separatist movements. However, the greatest short-coming of the process of decolonisation was that the forging of national identity was an external expression rather than an internal expression of nationalism, meaning it was foreign powers which dictated internal self-determination.

Westphalian model. Castellino defines the doctrine of nation building to postulate that 'narrow cleavages between peoples, whether ethnic, racial, cultural or religious should not be permitted to impede the development of the sovereign state'.[107] It is essential to acknowledge these doctrines of unity and their role within the system of public international law. The *Western Sahara case* provides an example of how nomadic existence challenged the legitimacy of nationalism within a predetermined territory. The court stated that:

> At the time, the Saharan desert was still the frontierless sea of sand used by the caravans as convoys use an ocean, for the purposes of a well-known trade; the desert was a way of access to markets on its periphery. The relation between the territory and human beings was effected by these aspects (...) If the desert is a separate world, it is an autonomous world in the conception of its relationships with those who have a different way of life.[108]

Gans describes the role of history as 'an inherent part of the essence of national groups and of nationalist ideologies'.[109] It is this historical justification and attachment to a territory that informs a claim to secede. Nationalist theory tables two arguments to highlight the centrality of history in the construction of the formative notions which follows nationalist claims. These arguments are based firstly on identity and secondly on settlement. The identity argument is premised on the claim that the territory is central to the formation of the identity of peoples. This side of nationalist theory provides the reasoning for recognising peoples' collective rights over the territory.[110] Situations where momentous historical events, relating to the group occurred on the specific territory or where their cultural practices and folk-tales integrally link peoples to a territory, serves as examples. Peoples' collective rights over a territory are then established via their link to the territory; this is manifested through their desire to govern themselves on that territory.

[107] Castellino, 'National Identity' (n 104) 258.
[108] (n 54) para 11 supra.
[109] C Gans, *The Limits of Nationalism* (Cambridge University Press 2003) 49.
[110] ibid 100.

The second argument of nationalist theory - the settlement argument demands physical presence on the territory as a basic principle. According to Miller this argument, requires the establishment of physical infrastructure on the territory that remodels the landscape.[111] It is in the employment of national labour and the establishment of nationally significant infrastructure that peoples acquire collective rights over a territory.[112] One can reconcile these arguments with the definition of indigenous peoples found in the International Labour Organisation Convention No. 169[113]. Article 1(1)(b) defines indigenous peoples as:

> Peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present states boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Essentially, what nationalist theory argues is that peoples employ their formative connections to a territory as the basis of exercising a right of exclusive jurisdiction over a territory. It consequently becomes evident, that the notion of nationalism drives the process of asserting that collective exclusive right, even a right to secede. This is thus not merely irredentism at play. It is necessary to note that law forms part of the social science and influences relationships such as national identity and territory.

2 4 2 The Multi-national and Ethno-culturally Diverse State

[111] D Miller, *National Responsibility and Global Justice* (Oxford University Press 2007) 218.
[112] Note the International Labour Organisation Convention 169 principles, with the focus on indigenous peoples their right to be consulted and specifically their right to decide their own development priorities.
[113] See, The United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007. The preamble of the Declaration however makes reference to certain characteristics normally attributed to indigenous peoples, such as their distinctiveness, dispossession of lands, territories and natural resources, historical and pre-colonial presence in certain territories, cultural and linguistic characteristics, and political and legal marginalization. Generally see, Universal Declaration of Human Rights (adopted 10 December 1948) GA res. 217A (III).

It is evident from history and contemporary conflicts that much of the unrest especially within developing states are as a consequence of uncertainties with regard to national borders.[114] The persuasive pragmatism of a right to secede would be found in its ability to accommodate multi-national and ethnic-culturally diverse peoples within its normative definition. The aspirations of peoples within a territory to secede as an expression of their national and ethnic-cultural identity demands a subscription to the same notion of statehood that they are trying to diminish. This creates a paradox. It can be illustrated through the relationship between the resistance to secession and the object of what secessionist aims to achieve. The report to the League of Nations on the Äland Islands Question stated that:

> To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the state as a territorial and political unity.[115]

A position that was upheld by the committee of jurist on the Äland Islands Question, who stated in their report that:

> Positive international law does not recognize the right of national groups, as such, to separate themselves from the state of which they form part by the simple expression of a wish, any more than it recognizes the rights of other states to claim such a separation. Generally speaking, the grant or the refusal of such a right to a portion of its population of determining its own political fate by plebiscite or by some other method, is exclusively an attribute of the sovereignty of every state which is definitely constituted.[116]

[114] There is the Mali and Burkina Faso frontier dispute, Eritrea and Ethiopia, Thailand and Cambodia, the Caprivi situation in Namibia, Kosovo and Serbia, Pakistan and Bangladesh and most recently Northern and Southern Sudan, just to name a few.
[115] *Åland Island Case* (1920) League of Nations Official Journal Spec Supp 3, 28. Report presented to the Council of the League of Nations by the Commission of Rapporteurs.
[116] ibid 5-6.

The prevailing idea being that secession is a matter for domestic settlement. A practical example of the difficulties of secession, especially in a multi-national and ethnic-culturally diverse context – is the dispute between Eritrea and Ethiopia. Eritrea struggled for more than 30 years to gain their independence from Ethiopia. This dispute was settled in 1993, based on an agreement reached through arbitration.[117] Even after the dispute was settled the parties still could not agree on the demarcation of their borders. Ethiopia,[118] which is governed under a federal system, also provides an example of the co-existence of multi-national and ethnic-culturally diverse peoples under one state. The constitution of the Federal Democratic Republic of Ethiopia starts with the words, 'We, the Nations, Nationalities and Peoples of Ethiopia'.[119] This is a direct attempt to institutionalise the diversity of the people of Ethiopia. Chapter 2 of the constitution enshrines the constitutional principle that 'all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia'. Eritrea initially formed part of the Ethiopian federation of states but left before the proclamation of the new Constitution. Article 39 of the Ethiopian constitution is ground-breaking in that it provides for a constitutional right to secede, as will be further discussed below in chapter 3. Importantly the constitution sets out the substantive and procedural requirements for separation from the state.[120] Such a bold step in reforming the law is not without controversy. Pham concludes that 'To say that the introduction of this model aroused misgivings considerably understates the reaction to this novel approach to challenges of ethnicity'.[121] He goes further to quote an Ethiopian scholar who reiterates some of these misgivings in stating that 'recognition of the rights, obligations and respect for the language, culture and

[117] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (adopted and entered into force 12 December 2000) 40 ILM 260 (2001). See also Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Eritrea-Ethiopia Boundary Commission (13 April 2002) www.unhcr.org/refworld/docid/4a54bbec0.html accessed 17 July 2012.
[118] Ethiopia is considered by many to be the oldest state in Africa. However, Liberia who declared its independence in 1847 was the first African state to do so. Many commentators ascribe this title of oldest state still to Ethiopia, because it was never colonised and has enjoyed a long undisrupted lingering political independence from as far back as biblical times.
[119] Constitution of the Federal Republic of Ethiopia (8 December 1994) in 1995 (1) Negarit Gazeta 55.
[120] The issue relating to the constitutionalisation or domestication of a right of secession will be dealt with in chapter 3.
[121] J Pham, 'African Constitutionalism: Forging New Models' in Levitt, *Africa* (n 81) 190.

identity of nations are the first difficulty but unavoidable step toward non-ethnic politicisation and a multiparty system'.[122]

Similarly, in South Africa where there is also a multitude of different ethnic-culturally diverse peoples the constitution provides for constitutional development that would be able to accommodate a right to secession. Political and constitutional entrenchment of a right to secede could be justified under section 235 of the South African Constitution[123] that states:

> The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of self-determination of any community sharing a common cultural and language heritages, within a territorial entity in the Republic or in any other way, determined by national legislation.

Interpretation of these provisions will be critical in mapping the normative character of a right of secession within especially the African multi-national and ethnic-culturally diverse context. Regional African jurisprudence has already shown that traditional international legal principles are central to its reasoning. In *Katangese Peoples' Congress v Zaire* (hereinafter the *Katanga case*)[124] the African Commission for Human and Peoples Rights declared that there was an obligation on Katanga to exercise a form of the right to self-determination, that was not in conflict, but compatible with the sovereignty and territorial integrity of former Zaire (Now known as the Democratic Republic of Congo). This conclusion is reconcilable with the views expressed above that international law and statehood is premised on the principle of stability and the Westphalian model. It cannot be excluded that secession can also be a catalyst for peace and stability. However, a right to secede needs to incorporate the values of the rule of law as well as legal certainty.

---

[122] ibid.
[123] Act 108 of 1996.
[124] Katangese Peoples' Congress v Zaire [2000] AHRLR 72 (ACHPR 1995).

2 5 Concluding Remarks

History has shown that even though a right to secede does not enjoy outright recognition, this has not prevented secession from taking place. Where international law provides a legal basis for the legitimacy of secession this would increase legal certainty surrounding the concept. Even though, the inquiry into a definition of secession did not deliver clear and concise characteristics of the elements of secession, it is within the different perspectives of the theories discussed that a definite image of the nature of secession emerges. It is clear that a general theory of secession is extremely difficult to establish and that currently it is non-existent under contemporary international law. However, the conceptual framework offered in this chapter will guide the further inquiry into the prescriptive nature and character of a right to secede.

The development of the right to self-determination has been contentious outside of the colonial context. However, this still seems to be the most viable path to follow in establishing a legitimate right to secede. In both the *South West Africa case* and the *Western Sahara case*, the court respectfully overlooked opportunities to further entrench self-determination as a peoples' right in international law. This was a step back from the court's conclusion in the *Case Concerning East Timor (Portugal v Australia)* (hereinafter *East Timor case*), where the ICJ held that:

> In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.[125]

Even with this judgment, the principle of stability governed the court's conclusion in a bid to maintain the status quo. The ICJ, as the appropriate international forum to resolve territorial disputes needs to reform its position in upholding this vague

[125] *Case Concerning East Timor (Portugal v Australia)* (Judgment) General List No. 84 [1995] ICJ Rep para 29.

principle of stability. Retaining the status quo only makes rational and logical sense where there is no immediate or future threat of violence against the civilian population.

Franck makes the example that, while international law approved a formal right to secede to Croatia, from the former SFRY, the peoples in the Serb regions of Croatia were not afforded the same right.[126] Franck states that, 'The present normative uncertainty, if not disarray, has generated a remarkable gaggle of paradoxes. The law has almost unlimited tolerance for paradox; but not for blatant unfairness'.[127] A similar example seems to have emerged from the historical thread running through secession and its conceptual framework. Seshagiri also points us to another inconsistency in international law. With colonial emancipation, a right to self-determination was allowed, but limited by the perpetuation of colonial administrative border via the adherence to the doctrine of uti possidetis.[128] Two of the obstacles in the formation of a normative framework for the exercise of a right to secede seems to be these paradoxes and an ever sense of unfairness[129] in the application of international law.

In this regard, Groarke moves from the position that the true premise of international law is agreement. He finds that this is rather a political standard than a legal one. He concludes by affirming that agreement is a poor substitute for morality, but concedes that it is the law that is the provider of this deficiency.[130] This was also the position in the *Quebec case*[131] where the court ruled that negotiations needs to follow a referendum where a clear majority is in favour of secession. The court also stated that such a referendum needs to have a clearly posed question. The following chapter continues from consensus and agreement to investigate the domestication of secession. Where different jurisdictions have incorporated a right to secede into

[126] T Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) 160.
[127] ibid.
[128] Seshagiri (n 53) supra.
[129] The issue of fairness will be dealt with later in the research, where the justification of a right to secede is handled. Fairness will be interrogated in light of the political and moral justification of a right to secede.
[130] Groarke (n 66) 166.
[131] *Quebec case* (n 25) para 149.

their constitutions, the denial of a right to secede becomes moot. The problem is that the municipal inclusion of the right might prevent it from being enforceable on the international plain. Below this argument is advance through investigating the interplay between municipal and international law within the context of a process of secession.

3 The Normative Character of a Codified Right to Secede

3 1 Introduction

Chapter 2 outlined the historical context of secession, with a focus on the conceptual framework relating to secession. It further aimed at establishing a viable definition of secession following the traditional path of the moral justification of secession. This chapter seeks to build on the previous chapter and investigate the potential of a departure from the traditional moral focus of secession. This process is initiated by focussing on the prescriptive character of the codified right to secede. This will serve as the backdrop to chapter 4, which analyse the relationship between secessions and self-determination as a norm of international law.

This chapter approaches the issue of the domestic entrenchment of a right to secede from a constitutional angle still maintaining the international perspective. The discussion is centred on how a right to secede can be domestically entrenched in a manner that is reconcilable with international law. This seemingly removes the right from the scope of international law, but the consequence of exercising the right brings with it direct implications on an international level. The primary consequence is the creation of a new state, which serves as a subject under international law. Consequently, the application of domestic law entrenching the right to secede has a direct impact on the formation and recognition of legal personality under international law. The traditional view of legal personality as explained by Shaw, where he suggests that:

> Within the body of international law, the concept and consequences of statehood clearly play a crucial role. The State is the primary, although not the sole, subject of international law and the law cannot therefore remain indifferent to the circumstances of its coming into existence.[132]

[132] M Shaw, *Title to Territory in Africa: International Legal Issues* (Clarendon Press 1986) 145.

One of the central questions that this chapter seeks to address is whether a right to secede is better served within the realm of domestic law or that of international law. An investigation is undertaken to establish how a domestically entrenched right to secede positions itself in relation to both international and domestic legal systems. Further, it analyses the relationship between constitutionalism and secession. The chapter presents the questions, whether the primary objectives of these two concepts are not fundamentally contradictory. Does the one not aim at political unity and the other disintegration? How does constitutional entrenchment of the right reconcile this potential anomaly? Ultimately, it is hoped that the answers to these questions will be critical in discerning the normative character of a right to secede as a primary objective.

Furthermore, this chapter seeks to shed light on the methodical weaknesses and strengths that are present within codified versions of the right to secede. Historical examples of the inclusion of the right into constitutions have served as political compromises, which presents a potential weakness. This chapter highlights the common traits of the constitutional right. This is achieved through focussing on the substantive merit and the procedural legitimacy of the right.

3 2 The Rational of Codifying the Right to Secede

3 2 1 Introduction

Where the right to secede is recognised within a municipal constitution, in general international law becomes secondary in the application of the right. All perspective of the right consequently needs to be cognisant of the presence of legal dualism in such a situation. In discussing the legal dualism of constitutionalism and international law, as well as the reasons there to, Michelman states that:

> A very striking feature of constitutionalist legal dualism is that it channels demands for direct justification to the higher-law scheme of constitutional essentials; it allows ordinary political acts to be justified indirectly – to

> inherit justification from above – by showing how they issued from an accepted or acceptable higher law.[133]

Following this rationale, it can be argued that where the right to secede is presented within a constitution, secession finds justification under those constitutional essentials. These constitutional essentials are commonly understood for being the founding constitutional principles. Michelman argues that the purpose of this approach is to preserve the core of society, be it the substantive or procedural values of its social condition. Thus, the rationale of constitutional or domestic inclusion of the right to secede is not only to establish legitimacy, but also to promote societal values. Constitutional inclusion of the right to secede still needs to operate within the framework allowed by international law in its interplay with municipal law.

Buchanan highlights the need for a constitutional theory on secession.[134] He argues that 'This is far from being a merely academic exercise. All indications are that we are entering an era of extraordinary constitutional activity'.[135] In hindsight, his prediction carries merit, the world has moved towards proliferation of constitutional dispensations. In cases where the right to secede was codified within certain jurisdictions,[136] it has always been beset with controversy over its legal effectiveness and utility. Ironically, it has been these controversies over legal effectiveness and utility that has managed to keep the debate on secession contemporary. The practical examples and theorisation over the recognition and existence of the right have informed not only the moral justification of secession, but also its legal status in both international and domestic law. The constitutional codification of the right to secede, through inclusion into domestic law, presents a strong argument for legal certainty. However, legal theory demands that the right features both the substantive and procedural characteristics that will underpin its legal nature. Buchanan furthers the debate by proposing two pairs of what he calls ideal type models for a

[133] F Michelman, 'Can Constitutional Democrats Be Legal Positivists? Or Why Constitutionalism?' (1996) 2:3 Constellations 300.
[134] Buchanan, *Secession* (n 1) 127.
[135] ibid.
[136] ibid.

constitutional right to secede.[137] He indicates that 'The purpose of these models is simply to help structure the options for developing frameworks within which a constitutional right to secede might be formulated'.[138] Consequently, Buchanan proposes models which provides boundaries, within which a normative character for a codified right to secede can be developed.

Buchanan names his first 'ideal type model', the substantive model. This model proposes a direct link between the moral justification of secession and the codified right. Following this reasoning, the formulation of the right needs to set out all the individual moral justifications for secession. These individual moral justifications present themselves in the form of substantive conditions for when peoples can secede. In order to access the right, peoples need to demonstrate that their situation is comparable with one of the substantive justifications comprising the right. Where peoples' right to their cultural identity and link to a specific territory are consistently grossly violated and/or denied by the state or a majority (in case of individuals), serves as an example. Consequently, peoples could only employ the right to secede where such injustice is a specifically mentioned as a ground for secession. Meaning it forms part of the substantive justification to secede.

The other of Buchanan's models that are akin to the substantive model is the fault model. The fault model proposes that the legitimacy of secession must be conditional to exclusive blame on the part of the state. Buchanan argues that 'This approach is a special version of the substantive model'[139] and forms part of the first pair of his ideal type models. The moral justification proposed by Buchanan's Remedial Right Only Theory, as discussed in chapter 2, finds close correlation under this model. Buchanan presents the examples that 'The need to preserve cultural identity as such would not count as a legitimate justification for secession, nor would a group's desire to found an autonomous small-scale democratic community'.[140] The

[137] ibid. 131.
[138] ibid.
[139] ibid. 135.
[140] ibid.

fault model places the state at the centre of peoples' secessionist aspiration, by making the execution of the right conditional to state liability.

Buchanan's third ideal type model is the procedural model. This model forms part of his second pair of models. Under this model, the need to prove the substantive (moral) justification for secession becomes secondary, 'Instead, only various constitutionally specified procedural requirements must be satisfied'.[141] With this model, the right to secede is formulated within the constitution, to set out only the procedural requirements to secede. An illustration would be where the constitution stipulates that a referendum needs to be held, and a two-thirds majority will be the minimum number of votes necessary to approve a motion to secede. Buchanan suggests that this model is less conservative than the substantive model. His argument being that the substantive model inherently demands justifications for secession. This justification needs to be captured within the framework of the final formulation of the right. The procedural model departs from the presumption that secession is legitimate in principle and that procedural requirements needs to be met first. The morality of secession and with it the substantive requirements; will still have to be complied with, these are however secondary considerations after the procedural ones. Buchanan's fourth model - the no-fault model continues with the importance of procedural compliance.

The fourth model that Buchanan suggests is the no-fault model. This could be described as the extreme one amongst the presented models. With this model, no allegation or proof of a violation of rights by the state or a majority is necessary. The model is akin to the procedural model to the extent that it requires no substantive justification to secede. Although premised on the procedural model, the fundamental difference is that secessionist can proceed through a strict adherence to the procedural criteria required by the codified right. Consequently, the model allows for secession with a disregard for the moral or substantive justifications. Secession would still be possible under the no-fault model where the constitution recognises the

[141] ibid. 132.

right to secede, but does not provide for substantive or procedural requirement. These would be situations where only the right to secede is recognised without any procedural conditions being attached. This would be where the constitution recognises the right to secede, without prescribing the substantive or procedural requirements for secession.

Buchanan's models above, focuses on the moral justification for secession and fundamentally informs the views under chapter 2. The models do not stand in opposition to each other. Buchanan suggests that they only represent diverging extremes and that hybrids of these models could ultimately inform the right which is drafted into legislation. When reflecting on the relationship between a purely substantive approach and a purely procedural approach Buchanan argues that:

> Although a purely procedural approach is morally permissible, it might be thought that including a requirement of substantive justification is morally preferable because it more directly mirrors the moral facts about secession.[142]

There are pros and cons for following either one of the models presented. However, to simplify the discussion, the cores of these models follow one of two essentials. Either secession based on substantive justification or procedural justification. The relationship between substantive and procedural requirements is not without controversy. It would be much easier to prove a procedural defect than a substantive one. A pronouncement on a substantive requirement is potentially more informed by subjective aspects, where a procedural judgement is more objectively predictable. Moral facts are not linked to how to secede, but tackles more the issues dealing with why one would secede, – the substantive moral justifications. Whichever model followed the right to secede needs to be legally justifiable.

[142] ibid.138.

The purpose of any secessionist movement is the establishment of an independent territorial entity. This new entity needs to be politically and territorially separate from the dominant state under whose sovereignty the contiguous territory fell. The discussion in the previous chapter highlights that a common characteristic in defining secession was the creation of a new state. The operation of the right to secede under a legal theory needs to give rise to substantively and procedurally legitimacy. This in turn, needs to be directed towards establishing legal personality under international law. Whether one considers a right to secede as an individual right, only executable by a concerted group effort[143] or a collective group right,[144] the establishment of a new state entity remains central. Even where peoples do not choose to form a new sovereign state, but opts for integration or free association, a new legally recognised entity under international law still comes into existence. This perspective moves away from the moral issues of secession and enters the normative considerations of a right to secede.

Roach argues that a need for a shift in perspectives is necessary to 'an over focus on the moral justification of the right in literature tuned towards ethnic conflict resolution'.[145] The disadvantage of this approach is that 'it fails to take adequate stock of the strategic and legitimizing function of this right and the issue of how this function might further qualify the moral justification of the right to secede'.[146] This begs the question, how would the strategic and legitimising function qualify the right's moral justification?[147] The debate on secession needs to develop away from the moral grounds of its justification to incorporate a process of secession. Such a departure should ultimately enhance the moral rationale for secession. Even if no moral justification for secession is drafted into a codified right, its morality can still be located within the rationale for incorporating the right in the constitution.

[143] As the case would be for proponents of the Remedial Right Only Theory. See sub-chapter 2 3 1.
[144] This view of a right to secede is more reconcilable with Primary Right Theory. See sub-chapter 2 3 1.
[145] S Roach, 'A Constitutional Right to Secede? Basque Nationalism and the Spanish State' (2007) 8 (4) International Studies Perspectives 446, 458.
[146] ibid.
[147] Buchanan argued above (n 1) that the moral justification of secession is akin to the substantive normative character of a right to secede.

Miller argues that 'the conditions justifying secession would need to be stated in a form that a judicial body could apply, and this immediately slants the discussion in favour of certain criteria and against others'.[148] The right to secede needs to become effectively and legally operational to find legitimacy through compliance with the norms and the rule of law under international law. A clear understanding and distinction of the substantive and procedural nature of a legal right to secede is critical for international legal theory. It is only via subscription to legal theory that a court can promote legal certainty and properly apply the law against the normative background of the right to secede.

In commenting on the *Quebec case*,[149] Shaw concludes that 'The situation of secession is probably best dealt with in international law within the framework of a process of claim, effective control and international recognition'.[150] This proposal seems to be an appropriate path to follow to establish the normative character of a codified right to secede. The proposition advanced by Shaw consequently forms a premise for further investigation into the normative nature of a codified right to secede. This will in turn advance the legitimacy of accessing and executing the right.

3 2 2 Claim

The substantive nature of the right to secede cannot be definitively separated from the procedural character of the right. In summary, the 'why' question overlaps with the 'how' question. This follows the reasoning of Buchanan above, in that the substantive question of a right to secede is linked to the moral justification to secession. The inclusion of a procedural inquiry does not dilute the established substantive importance of the right. This approach serves to inform international legal theory and substantiates Roach's conclusion that it would further qualify the moral justification of secession.[151] In following Shaw's proposition on a framework for

[148] D Miller, 'Secession and the Principle of Nationality' in M. Moore (ed), *National Self-determination and Secession* (Oxford University Press 1998) 63.
[149] (n 25) supra.
[150] Shaw (n 24) 444.
[151] Roach (n 145) 458.

the process of secession, the logical point of departure in initiating a secession movement is the establishment of a claim to secede.

A claim to secede would be based on a subjective or objective notion of an entitlement over a territory. In cases where there is a recognised right to secede, both the substantive and procedural character of the right would have to address this. Where there is only a perceived (subjective) entitlement, the only basis for the substantive nature of the claim would be its moral justification. This view substantiates Buchanan's fault model discussed above. No claim could be framed outside the parameters of either legislative recognition or moral ratification in order for it to be successful. The claim for secession needs to proceed based on an averment, that a legal claim is present over a determined territory; by peoples present on the territory. Roth puts this in perspective with reference to the requirements of the Montevideo Convention on the Rights and Duties of States (hereinafter the Montevideo Convention)[152] by stating that:

> As independent criteria for statehood 'permanent population' and 'defined territory' merely begs the question, since virtually all statehood claims, whether or not accepted in the international legal order, characteristically include sufficiently precise claims on behalf of a permanent population to a defined territory.[153]

A claim to secede finds at its opposing end a claim to authority from the dominant state. With secession the claim would always be directed at a portion of a territory, an opposing claim to authority naturally originates from the dominant state. The claim cannot be without an appeal for the withdrawal of territory. This can be reconciled with the prevailing definitions of secession above, as well as the requirements for statehood set out in the Montevideo Convention. Webb also follows this reasoning in his description of secession, he states that 'It is a bid for

[152] Montevideo Convention on the Rights and Duties of States (Inter-America) (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.
[153] B Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11:2 Melbourne Journal of International Law, 399.

independence from the state through the appropriation of the state's territory'.[154] Consequently, in the description of a right to secede, the substance of the claim needs to be linked to a determined territory. A court then has to adjudicate on these two opposing interest, a claim to territory and a claim to authority.[155] The procedural character of the claim needs direct legal expression. Such requirements can practically only become legally relevant via specific reference within a statute. As such, any procedural conditions would have to be drafted into the legislation recognising the right to secede.

Once a claim to secede has been legally established, the next question is whether peoples are or would be able to exercise effective control that territory. This requires a shift in perspective from the moral justification, predominantly presently with the claim, to observable factual situations. This legal justification would be reflected through the peoples' physical presence on the territory. The claim would be assisted through bring it from the territory that is under dispute. This will strengthen a presumption of their control over the territory. However, effective control needs to promote the legitimacy of the right. The doctrine of effective control is not without controversy in international law. Below the doctrine would be tested as a potential element within the process of secession.

3 2 3 Effective Control

The traditional view of the elements which constitutes statehood is supported under the Montevideo Convention. One of the elements required under this convention for constituting a state is effective control over a territory.[156] As discussed in chapter 2, international law is premised on the principle of stability. Consequently, by bringing a right to secede in line with the rule of law under international law it will be

[154] MJ Webb, 'Is there a Liberal Right to Secede from a Liberal State?' (2006) 10 (4) TRAMES: A Journal of The Humanities & Social Sciences 372.
[155] The dominant state cannot have a claim to the territory, because they have a right to the territory based on the principle of sovereignty and territorial integrity.
[156] Montevideo Convention (n 152). Article 1 of this convention sets out the four criteria of statehood as being; (a) a permanent population; (b) a defined territory; (c) functioning government and (d) the capacity to enter into relations with other states. All of these conditions are geared towards objectively proving effective control over an territory.

reconcilable with principles of international law, such as stability, peace and security as employed by international tribunals such as the ICJ.[157] The process as set forth by Shaw has the potential to promote stability and a peaceful transition to independence. However, it would need to interpret the principle of effective control with enough constraint.

The rational of assessing effective control as part of the process of secession is because it forms an essential requirement of statehood. In addition, it relates directly to the doctrine of effectiveness in international law. This specifically relates to state formation, acquisition of territory and in recognising a government regime. Shaw considers effectiveness valuable as a creator of legal results, primarily due to the nature of international law, as a legal system that is decentralised and horizontally structured.[158] More specifically, he regards it essential in the acquisition of territorial sovereignty.[159] He suggests 'that one may regard the principle of effectiveness as the basic applicable doctrine regarding the acquisition of territory'.[160] Within the process of secession, a successful secession will obviously yield the acquisition of territory, this makes Shaw's contention even more relevant. The doctrine of effectiveness consequently underwrites a comprehension of effective control.

In *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v United States of America)* (hereinafter the *Nicaragua case*),[161] the court drew attention to the principle in Article 3(d) of the Inter-American Treaty of Reciprocal Assistance[162] that states that:

[157] (n 20) supra.
[158] Shaw, *International Law* (n 24) 18.
[159] This should logically also relate to the establishment of territorial sovereignty. An approach which is more relevant to secession.
[160] Shaw, *International Law* (n 24) 18.
[161] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14.
[162] Inter-American Treaty of Reciprocal Assistance (adopted 02 September 1947, entered into force 03 December 1948) OASTS No. 8 (Rio Treaty).

> The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.[163]

The ICJ looked at effective control as more than mere physical control over a territory. The court interpreted the document progressively to include the recognition of democratic principles in the forging of unity amongst American states. The result being that the effectiveness of state control is consequently informed by the representative democracy that legitimises the regime of the day. In determining effective control, the position of the state losing territory should not be forgotten. In the *Islands of Palmas case*,[164] the arbitrator, Judge Huber, furthermore begs the question whether:

> The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right.[165]

He argues that, effectiveness will still be present where there is peaceful and continued display of state power over a territory. Proponents of secession would argue that effectiveness should be a continuous requirement for state legitimacy. Consequently, where a sovereign state cannot prove the effectiveness of their continued occupation over a territory, a dominant majority with effective control should be free to secede. Although the reasoning in the *Nicaragua case* relates to military intervention and in the *Island of Palmas case* to acquisition of territory, both cases reflect on perspectives of effective control under international law. The *Nicaragua case* indicates that effective control can extend beyond the traditional paradigm of pure law and impact on political norms such as democracy. It is clear from the *Islands of Palmas case* that effective control under international law should not only be the basis for the

[163] *Nicaragua case* (n 161) para 259.
[164] *Island of Palmas Case* (United States v Netherlands) [1928] 2 R.I.A.A. 829.
[165] ibid 839.

establishment of rights to territory, but should also be a requirement for the maintenance of such rights.

The substantive nature of effective control in the context of a codified right to secede will have to relate to the manner of territorial acquisition. Effective control over a territory would strengthen the moral justification for wanting to secede. However, the inclusion of effective control as a procedural requirement with the right to secede, could threaten the principle of stability and the nature of a constitutional democratic dispensation. It might find realistic application within a federal system, where free entry and exit from the federation is possible. Effective control cannot serve the international law principles of stability, peace and security where it dictates the procedural conditions of exercising a municipal right to secede. However, this might be interpreted to legitimise the use of force to establish effective control over a territory.

The doctrine of effective control is also not without critics. Roth argues, in postulating the decline of the doctrine of effective control, that:

> Demands that local conflicts be resolved in accordance with existing domestic constitutional norms may seem to befit an international rule of law, but these demands misleadingly portray international and domestic legality as a seamless web.[166]

The interplay between international law and domestic law is divided between the monist and dualist approach. The monist doctrine 'holds that international law is part of the domestic law automatically without the necessity for interposition of a constitutional ratification procedure'.[167] The dualist doctrine holds the contrary, it is premised on the distinct separation of the two systems. Accordingly, international law

[166] Roth (n 153) 439.
[167] Shaw, *International Law* (n 24) 129.

can only have effect on municipal law once it has been transformed into local legislation. Shaw explains that:

> This is because of the fundamental different nature of inter-state and intra-state relations and the different legal structure employed on the one hand by the state and on the other hand as between states.[168]

On the other side of the argument, Arangio-Ruiz describes the monist position. He describes it as:

> [A]ll the broadly expanding presentations of international law as a public, constitutional (if not supra-constitutional) systems over standing the legal systems of States in a way essentially comparable to the manner in which the fundamental norms of a federal State over stand the member State's (dependent) systems.[169]

In the use of the word 'over stand', which seems to be Arangio-Ruiz's own creation, he refers to the superiority of international law and federal law respectively. However, the impact of the constitutional entrenchment of a right to secede cannot escape the rule of law. It is not the domestic law that endows a new territorial entity with legal personality; this is derived from international law. International law also provides the legal framework within which the new territorial entity will be operational. Although effective control is observed domestically, it also affects the international sphere. Effective control seems to be at odds with international law principles, such as stability, peace and security. Consequently, it cannot be an imperative part of the process of secession. Effective control should be the result of secession. Then it will serve to enforce the maintenance of the right. Substantively it would enhance the moral justification of the right, but procedurally it can only form part of the right once it is an already objectively observable reality. Once effective

[168] ibid 122.
[169] G Arangio-Ruiz, 'International Law and Interindividual Law' in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide Between National & International Law* (Oxford University Press 2007) 16.

control has been established, a legitimate case can be made towards state recognition.

3 2 4 Recognition

Since it is the primary objective of secession to form a new territorial entity, the focus on state recognition is a rational and logical progress to the process. The issue of state recognition under international law is a difficult one. Not only are there a number of considerations and viewpoints on the matter, but the position of international law on the topic has remained fragmented. This fragmentation has been caused mainly by the strong interplay with political issues.[170] International law subscribes to two basic theories of recognition, the constitutive and declaratory theory.[171] The constitutive theory holds that it is the act of recognition by existing states that allow legal personality to attach to a new territorial entity. While declaratory theorists believe that it is the existing, factual circumstances which endows an entity with legal personality, regardless of any acts of recognition from external states. Crawford reflects on the declaratory theory in stating that 'An entity is not a state because it is recognised, it is recognised because it is a state'.[172]

Where the issue of secession departs from the scene of international law and entrenches itself within the contexts of domestic law, the different perspectives on the relationship between municipal and international law become critical. Musgrave reflects on the Plebiscitary Rights Only theory, which he calls the 'internal theory' in stating:

> Secession on the basis of ethnic criteria could be justified by the 'internal theory', which maintains that secession is not a matter of international law

[170] Under international law the political nature of an issue or question does not deprive it from having a legal character and consequently does not exclude international law's application to it. See, *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 166, para.14.
[171] Shaw, *International Law* (n 24) 368 and R Wallace, *International Law* (6th edn, Sweet and Maxwell 2005) 84.
[172] Crawford, 'The Right to Self-determination' (n 21) 93.

> at all, but solely of domestic concern. The theory is based on the well establish principle of non-interference'.[173]

Musgrave further relates his argument to Article 2(7) of the UN Charter that precludes the UN from intervening in matters falling exclusively within the domestic jurisdiction of a state. The ICJ dealt at pains with this principle in the *Nicaragua case*.[174] The principle of non-intervention is also present within the prelude of the Declaration on Friendly Relations. The rational of this prohibition is the protection of the principle of territorial integrity.

If Musgrave's reasoning is followed, the entrenchment of a right to secede within the contexts of domestic legislation, excludes international law from the process of secession. However, Musgrave further suggests that 'It follows that secession is neither legal nor illegal in international law, but is a legally neutral act, the consequences of which are, or may be regulated internationally'.[175] If secession is a legally neutral act under international law, then surely this is a contradiction on his earlier assertion that the principle of non-intervention makes secession a matter of domestic concern. Further, the primary objective of the process of secession is the creation of a legal subject as defined by international law. Even if, a right to secede is entrenched within the framework of municipal law, the legal consequences spill over onto international law. Recognition as a step in the process of secession is of domestic concern, but relies on international law to determine its status.

The conclusion reached suggests an inherent contradiction with the incorporation of a right to secede within the realm of a constitutional document. A constitution traditionally contains, within its founding principles, a declaration on its territorial and political unity and in most cases affirms the sovereignty of the state. No right of secession can be entrenched in a constitution where such a right is irreconcilable

[173] T Musgrave, *Self-Determination and National Minorities* (Clarendon Press 1997) 192.
[174] *Nicaragua case* (n 161) 108.
[175] Musgrave (n 173) 193.

with the spirit of the constitution and its constitutional principles. The recognition of the right to secede becomes engulfed with the eventual recognition of the newly created legal entity. Whatever the political motive is for constitutional inclusion, recognition can serve to limit the right or promote it. Norman makes it clear in the following statement:

> I have argued that an appropriately qualified right to secession would often make sense within the framework of the deliberative constitutionalism that Sunstein advocates: it could provide a better disincentive for secessionist politics than would constitutional silence on the issue.[176]

Both the monist and dualist perspectives on state recognition seem to be affected by the constitutional inclusion of the right to secede. Similarly, none of the theories on state recognition seem to affect the process of secession in any practical way. However, state recognition is critical in understanding the aims to be achieved with secession and consequently remains the appropriate element to conclude the process of secession. The legitimacy of this suggested approach, needs to be tested against practical examples of constitutional inclusions of the right to secede. The process of secession needs to have real world application to enjoy legal application, this is what is endeavoured below.

3 3 A Temporal Reflection on the Municipal Entrenchment of a Right to Secede

3 3 1 Introduction

The objective of an investigation into the practical examples of the right to secede serves to address two questions. Firstly, does the domestic statutory or constitutional entrenchment of a right to secede in general provide for a genuine right, capable of execution or enforcement? Secondly, does the constitutional right to secede factor in the process of secession as explored above, being that of claim, effective control and recognition? Through the examples below the historical conditions for exercising

[176] W Norman, 'Domesticating Secession' in Macedo and Buchanan, *Secession and Self-determination* (n 15) 229.

the right to secede, both procedurally as well as substantively will be analysed. The interest in finding answers to these questions serves to contribute to a new perspective on legal personality in international law.

The examples below address in general, the research objective to highlight the normative characteristics of a right to secede. However, these examples deal with the topic of secession only from a domestic legal perspective. This does not render the results of such an inquiry irrelevant to international law. Further, such a constitutionally entrenched right still relates to the field of international law through its impact on legal personality in international law.

3 3 2 The Union of Soviet Socialist Republics (USSR)

Unger paraphrased Stalin in naming the USSR 'the "dictatorship of the proletariat" or the "dictatorship of the working class"'.[177] During both Lenin as well as Stalin's rule, this idea of a dictatorship of the majority was the propaganda of the time. It was argued to be more democratic than that of liberal states, because it was a not founded on a bourgeois minority ruling. Before the establishment of the USSR, the 1918 October Revolution[178] Constitution of the Russian Socialist Federated Soviet Republic (hereinafter the 1918 constitution) was enacted.[179] In Article 6 of the 1918 constitution, the independence of Finland and Persia and the proclamation of the right of self-determination for Armenia, was expressly proclaimed.[180] Article 2 of the 1918 constitution stated that 'The Russian Soviet Republic is established on the basis of a free union of free nations, as a federation of Soviet national republics'.[181] This substantiates the argument that the drafters of the 1918 constitution intrinsically recognised the independence of the different constituting republics. Musgrave explains that 'Lenin believed, by voluntary agreement: forced union would not

[177] A Unger, *Constitutional Development in the USSR: A Guide to The Soviet Constitutions* (Methuen 1981) 3.
[178] The October Revolution was preceded by the February Revolution of 1917, which deposed Nicholas II from power and brought an interim government. This interim government was removed by the revolt of the October or Bolsheviks Revolution of 1917.
[179] This constitution was adopted on 10 July 1918.
[180] Unger (n 177) 27.
[181] ibid 25.

endure, whereas voluntary union were much more likely to last'.[182] This might have been the official statement; however, history proved the contrary to be true.

Following the 1918 constitution, the formation of the Soviet Union produced three constitutions. The first was the 1924 constitution, which was the first to recognise a right to secede. Article 4 of the 1924 constitution read 'Every union republic shall retain the right of free secession from the union'.[183] The thinking of the time was that the right to secede was 'the very hallmark of what they described as the "sovereignty" of the member republics'.[184] However, the right was included more as a political pawn than a legally realisable right. The right's inclusion was to demonstrate political freedom rather than represent the possibility of leaving the union.

The following USSR constitution came into force in 1936. This constitution employed the same wording as the 1924 constitution in recognising the right to secede in article 17 of that document. This provision was as with Article 4 of the 1924 constitution, void of any substantive or procedural substance. Chkhikvadze best describes the position of the right within USSR constitutional jurisprudence; he explains the perception that 'the right to self-determination consist both of the right to secede and the right not to secede'.[185] He furthermore illuminates the logic of the USSR by showing that the belief of the time was that experience 'has shown that where nations have the right to self-determination, including the right to secession, they will freely associate'.[186] This is a conclusion that Musgrave also came to in assessing the rhetoric of Lenin.[187]

In 1977, the third USSR Constitution was adopted. This union of nations was premised on the ideology stipulated in article 70 of the constitution. It stated that:

[182] Musgrave (n 173) 19.
[183] Unger (n 177) 62.
[184] ibid. 54.
[185] V Chkhikvadze, *The Soviet State and Law* (University Press of the Pacific 2000) 28.
[186] ibid.
[187] Musgrave (n 173) 19.

> The Union of Soviet Socialist Republics shall be a single union multinational state formed on the basis of the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet socialist republics.[188]

This provision went further to set out the purpose of uniting nations and nationalities as the joint construction of communism. This is the legal context within which article 72 has to be read. Article 72 was a carbon copy of the previous two constitutional provisions. This article stated that 'Every union republic shall retain the right of free secession from the USSR'. Unger makes the point that the recognition of a right to secede was:

> Never very meaningful in practical terms, its theoretical status as the principal touchstone of union republic "sovereignty" is now further eroded by the new constitution's emphasis on the "unity" of the Soviet state and people.[189]

Although the 1977 constitution recognised a right to secede, the socio-political agenda; the joint construction of communism and an over emphasis within the constitution of the unity of the Soviet republics; inevitably countered the utility and effectiveness of the right. Separatist movements were further constitutionally suppressed, by provisions such as article 81 that stated, 'The sovereign rights of the union republics shall be protected by the USSR'.[190] The argument was that by incorporation within the USSR, union republics did not lose their sovereignty. However, it was the constitutional duty of the USSR to protect the sovereignty of the union republics. The effect of this position was that republics had to prove that the USSR neglected the duty to protect their sovereignty as a requirement to secede.

[188] Unger (n 177) 246.
[189] Unger (n 177) 203.
[190] ibid. 248.

The provision recognising the right to secede under the 1977 constitution is straightforward and without procedural detail. The fact that throughout the three constitutions, this right never developed into a more substantive right serves as evidence that the USSR government never intended this right to be exercised. Buchanan draws attention to the shortcoming of the 1977 constitution in that it:

> [H]as long included a right to secede, until the current rash of secessionist activity it contained no provision whatsoever as to how, for what reasons, or under what conditions secession might be under taken.[191]

Buchanan directly refers to the substantive and procedural shortfalls of the constitutional provisions. This makes the realisation of the proposed process of secession above even more unlikely. Webb concludes on a similar result from the 1977 constitutional provision as Chkhikvadze with the 1924 constitution. Webb states that:

> It seems that, while in the West we tend to think that 'all that is not forbidden is allowed', the Soviet view is the reverse. 'All that is not allowed is forbidden' is a fairly accurate characterization of the Soviet approach.[192]

He argues that because the constitutions of the USSR did not spell out the mechanisms for secession, the right never existed within the constitution.[193] However, it cannot be conclusively accepted that the absences of substantive and procedural mechanism nullifies the right. It does make its execution within a process of claim, effective control and recognition more difficult, but not null or void. The rational as discussed above of a codified right to secede, also argues for a right which can still be executable even with procedural and substantive defects or omissions. Buchanan's no-fault model would be applicable in this regard.

[191] Buchanan, *Secession* (n 1) 127.
[192] W Webb 'The International Legal Aspects of the Lithuanian Secession' (1991) 17 Journal of Legislation 314.
[193] ibid.

A more moderate reasoning would be that the right did not have legal force because it lacked procedural mechanisms. After the fall of the USSR, the Russian government promulgated the statute 'On the Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR' on the 3th of April 1990. The procedure set out by this piece of legislation provides the right to secede to specific geographically autonomously republics. This followed the Lithuanian secession attempt, and allowed for republics independently to decide their legal status. The process involved the holding of a referendum. Based on the successful outcome of the referendum, state parties would then enter into negotiations to determine the transitional arrangements. This is a clear indicator of the USSR giving substance to the right to secede. The right to secede was brought in line with the process of secession, even though the collapse of the union precipitated the promulgation of this legislation. Silverstein refers to three conditions for free secession under the Soviet Constitution. Firstly that it had to be a borderland, meaning not encircled in total by the USSR. Secondly, that there needed to be a concentrated majority, and finally that the population needed to be more than one million.[194] The proclamation of these conditions coincided with the disintegration of the USSR. It does however contribute to the development of an understanding of the procedural aspects of the normative character attached to the right to secede.

3 3 3 Socialist Federal Republic of Yugoslavia (SFRY)

The Yugoslavian aspirations of self-determination and secession were represented in both the 1946 and the 1963 Constitutions of the SFRY. These provisions were promulgated under the constitutions' Basic Principles and in article 1, which proclaimed Yugoslavia as:

> [A] community of peoples equal in rights who, on the basis of the right to self-determination, including the right of separation, have expressed their will to live together in a federative state.

[194] J Silverstein 'Politics in the Shan State: The Question of Secession from the Union of Burma' (1958) 1:1 Journal of Asian Studies XVII 55.

Under the 1974 Constitution of the SFRY, the proclamation was made under Basic Principle I that:

> The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution.[195]

This provision was contradicted by Article 5 of the 1974 constitution that stated that the boundaries and frontiers of the republics could not be altered, without SFRY consent. This is reconcilable with the principle of territorial integrity under international law. A principle enshrined in the Declaration on Friendly Relations. A more accepted perspective is that there was never any political will to allow any group to utilise the provision to express their independence. With the passing on of Josip Broz Tito[196] in 1980, the disintegration of the federation commenced. This event was the instigator for the first withdrawals from the union by Croatia and Slovenia.

Disagreement exist amongst international law scholars, as to what happened to the former SFRY. Some scholars argue that the SFRY was dissolved, i.e. the state seized to exist. Under these circumstances, recognition is not required for any of the new entities. However, others argue that secession did occur. Under such a situation, it is only the seceding states that require international recognition.[197] As Musgrave notes, 'The facts surrounding the declarations of independence of four constituent Republics indicate that their actions conform much more closely to secession than to dissolution'.[198] However, Opinion 1 of the Conference on Yugoslavia Arbitration Commission (hereinafter the Banditer Commission)[199] differs

[195] A Budding, 'Nation/People/Republic: Self-Determination in Socialist Yugoslavia' in and L Cohen Jasna Dragovic-Soso and J Dragovic-Soso (eds), *State Collapse in South-Eastern Europe: New Perspectives on Yugoslavia's Disintegration* (Purdue University Press 2007) 108. Translation provided by the author.
[196] Tito was the 1st president of the SFRY and was succeeded by Lazar Koliševski after his death.
[197] ibid.
[198] Musgrave (n 173) 200.
[199] Conference On Yugoslavia Arbitration Commission: Opinions On Questions Arising From

with this conclusion. In Opinion 1, the Banditer Commission had to conclude on one of two positions regarding SFRY. The first was whether the republics[200] of the SFRY were in the process of secession, in which case the SFRY would have continued to exist. The second position is that the SFRY was in the process of dissolution. If this scenario prevails, then the republics will be equal successor governments to the SFRY. The SFRY would then have ceased to exist only after all the constituting republics attained sovereignty. The Commission concluded that according to international law and the European Community Declaration on Yugoslavia and on the Guidelines on the Recognition of New States (hereinafter EC Recognition Guidelines)[201], the republics were not in the process of seceding, but that the SFRY's essential government organs had become powerless. Consequently, it was agreed that the SFRY was in the process of being dissolved.

Based on Shaw's proposition above, a claim to secede could be framed based on the codified right in the SFRY constitution, but no such claim was ever formally made by any of the republics. The lack in substantive and procedural conditions meant that the right could be enjoyed under the no-fault model, which proposes to be an extreme model. The decline of the doctrine of effective control is also clear within the contexts of the SFRY. Roth articulates this point quite clearly, where he states that:

> [T]he international community's rejection of local efforts to maintain by force the territorial integrity of Socialist Federal Republic of Yugoslavia ('SFRY'), in the face of clear majorities for independence within the constitutionally established territorial sub-unit, is of a piece with the international community's newfound reluctance to recognise unconstitutional seizure of power from democratically elected authorities.[202]

3 3 4 1947 Constitution of the Union of Burma (Myanmar)

The Dissolution of Yugoslavia, (Banditer Commission) [1992] 31 I.L.M. 1491.

[200] The republics of SFRY at the time were Bosnia, Herzegovina, Croatia, Macedonia, Montenegro, Slovenia and Serbia.

[201] European Community Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, [1992] 31 I.L.M. 1485.

[202] Roth (n 153) 395.

Burma was for the greater part of the beginning of the twentieth century under British colonial rule. On January 4th, 1948 Burma attained independence. The Union of Burma consisted of the states of Kachin, Karenni, Shan and Kayah. After independence, the process of constitutional drafting started. This process led to the adoption of the 1947 constitution and the formation of the Union of Burma.

Under chapter X of the 1947 Constitution of the Union of Burma,[203] the right to secede was recognised. The right declared four conditions under which secession could be achieved. Firstly, the right could only be exercised ten years after the adoption of the constitution.[204] Secondly, the 'State Council' could approve a resolution to secede from the Union with a two-thirds majority vote.[205] Subsequent to this, when such a resolution was passed the head of state would inform the union president of the passing of such a resolution and its result.[206] The president could then order a plebiscite in the relevant state to assert the will of the people.[207] As part of this constitutional mandate, the president could appoint a commission composed equally of members from the Union and the seceding state.[208] The fourth requirement revealed that only states that were not barred from access to the right might exercise it. In this regard only, the Shan and Kayah states had access to this right.

The right as promulgated within the 1947 Constitution consists only of procedural conditions and can be equated with Buchanan's procedural or no-fault models. There are no requirements to provide for a moral justification to exercise the right. Consequently the substantive character of the right is not articulated. Article 206 proclaims that 'Subject to the provisions of this Chapter, all matter relating to the exercise of the right of secession shall be regulated by law'. This means that the only manner by which complete secession would be achieved was for the Burmese

[203] The Constitution of the Union of Burma (1947) adopted on the 24th day of September 1947. http://www.blc-burma.org/html/Constitution/1947.html#RIGHT OF SECESSION <accessed 20 May 2012>.
[204] ibid Article 202.
[205] ibid Article 203(1).
[206] ibid Article 203(2).
[207] ibid Article 204.
[208] ibid Article 205.

parliament to legislate on the matter. This could provide an opportunity for the inclusion of substantive justification for the exercise of the right. However, the parliament could also use this power to bar access to the right. Silverstein concludes on these conditions that:

> [T]he framers provided a means for each Parliament to review the right and decide whether or not it wants to make the right exercisable by making the franchise and the necessary majority either easy or difficult to obtain.[209]

Practically within Burma, there were also external realities that made secession highly unlikely for the states that had access to the right. All of them are underdeveloped economies, and they would have suffered economically due to lack of resources. This leads to the conclusion that the right, might again, have been just an incentive to induce integration and protect the stability of the Union, rather than a genuine enforceable right.

The constitution of the heterogeneous populace of Burma was a document brought about by concessions and agreements. Key amongst these concessions was the shifting of vast amounts of economic and political power from the local tradition leaders and state level towards the federal union government. Silverstein explains that:

> The formal language of the Constitution does not give evidence of all the concessions and agreements which the Burmese and the frontier areas people made both prior to and during the drafting of the Constitution.[210]

In the aftermath of the constitution, these concessions brought about internal instabilities and sometimes even violent conflicts. The struggle for political power and the inherent deficiencies of the constitution led to the adoption of the 1974

[209] Silverstein (n 194) 55.
[210] Silverstein (n 194) 47.

constitution. This constitution was aimed at establishing 'The Socialist Republic of the Union of Burma'. The 'Revolutionary Council' with their socialist agenda excluded the secession clause from the constitution. The constitution was structured based on unity as the primary constitutional principle. Moscotti interprets Article 4[211] of the 1974 Constitution in that 'It signifies that sovereignty does not belong to one particular nationality; that it belongs to all nationalities of the land; and that it cannot be fragmented'.[212] Consequently, the right to secede was removed from the constitution, because it could never be exercised. The reasoning was that it did not belong to any one group, but to all. This constitution did not resolve the internal problems of Burma and this led to the drafting and adoption of yet another constitution in 2008.

In May 2008 after a referendum[213] was held, the new constitution of the Republic of the Union of Myanmar[214] was adopted. Article 10 explicitly state that 'No part of the territory constituted in the Union such as Regions, States, Union Territories and Self-Administered Areas shall ever secede from the Union'. This provision serves to revoke the right to secede, present in the previous constitution. This prohibition follows the spirit of the preamble that reads that 'non-disintegration of the Union, non-disintegration of national solidarity, and perpetuation of sovereignty;' are the basic principles of the constitution. It cannot be conclusively concluded whether, the current constitution has been strengthened or weaken by its position on secession. The status of political discourse and the gross violation of human right do not provide the people of Burma with an option of external political expression. Silverstein puts the right to secede in perspective under the 1947 Constitution in stating that:

> The right of secession must be viewed as an unrealized and vague power which is more useful as a potential than as a reality (…) So long as it

[211] 'National sovereignty shall reside in the entire State.'
[212] A Moscotti, *Burma's Constitution and Election of 1974: A Source Book*, (Research Notes and Discussions Series No. 5, Institute of Southeast Asian Studies 1977) 39.
[213] The referendum was marred by controversy and dissatisfaction. Both local and international observers reported widespread irregularities. See Amnesty International 2009 Report on 'State of the World's Human Rights': http://report2009.amnesty.org/en/regions/asia-pacific/myanmar <accessed 20 May 2012>.
[214] http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/-ilo_aids/documents/legal document /wcms_117403.pdf <accessed 21May2012>.

> remains a potential right, it will be useful to the people of the Shan State as a bargaining weapon because the leaders of the Union are determined to establish the rule of law and respect for the Constitution.[215]

What is significant about Burma as an example is that although the right to secede existed initially, it had no political value. Firstly, for the limited groups who could exercise the right it was never a real option, due to the geographical and economic realities of the region and state. Consequently, no claim to secede could realistically be made. Secondly, even though the right never posed a real threat of disintegration it has been progressively discredited through Burmese constitutional development. The constitutional process carried with it a shift in political power to the union government via power concessions. This reduced the peoples' ability to retain effective control over their territories, which in turn made them heavily dependent on the union. However, Burma is distinguishable from the USSR and SFRY. In the Burmese example, the right was open to provinces, which did not consider themselves as republics within the union. The USSR and the SFRY were unions providing the right to secede to their republics. The Burmese example of the right was also more developed than just a mere affirmation on the existence of the right. The Burmese constitution entrenched purely procedural conditions to exercise the right. This is akin to Buchanan's procedural model of a constitutional right to secede.

3 3 5 Ethiopia

In 1994, Ethiopia adopted a new constitution. It provides us with, both the most recent constitutional right to secede and with an African example. What makes a study of the Ethiopian situation even more intriguing is the fact that the recognition of a right to secede was established independent from the process of decolonisation. Thus, the presence of the right within the constitution is not because of a history of oppressive colonial rule. This is because Ethiopia was never colonised.[216] Ethiopia is a federal state with a multi-ethnic populace where different ethnical groups are

[215] Silverstein (n 194) 57.
[216] A Habtu, 'Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution' (2005) 35(2) Publius 315

territorially grouped. The two weighty issues that face Ethiopian society are class divides and ethnical differences.[217] Van Der Beken explains that:

> The historical experience of many Ethiopian peoples and the ethnic program of the principal political organisations had created a situation in which only a radical, ethnic restructuring of the Ethiopian state could guarantee its continued existence.[218]

The inclusion of the right to secede by the Ethiopian was both unique and controversial within their federal system. Habtu reiterates Van Der Beken's view that with the decision to form a federal state 'The main purpose was to achieve ethnic and regional autonomy, while maintaining the state of Ethiopia as a political unit'.[219] This decision was necessary to avert both political and civil unrest in the wake of the fall of military rule in Ethiopia.

The preamble of the Ethiopian constitution starts with the words 'We, the Nations, Nationalities and Peoples of Ethiopia'.[220] This statement affirms the flexible multi-nationalist approach of the constitution and confirms Ethiopia's recognition of its multi-ethnicity. Article 39 specifically voices the right of the peoples of Ethiopia to secede. Article 39(5) declares; what constitutes peoples, by giving direct expression to what a nation, nationality and peoples are. The article stipulates that:

> A 'Nation, Nationality or People for the purpose of this Constitutions, is a group of people who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.[221]

---

[217] Ethnicity proved to be primary amongst these as will become clear below.
[218] C Van Der Beken, *Unity in Diversity – Federalism as a Mechanism to Accommodate Ethnic Diversity: The Case of Ethiopia* (LIT Verlag 2012) 128.
[219] ibid 313.
[220] The Constitution of the Federal Democratic Republic of Ethiopia, adopted on the 8th of December 1994.
[221] ibid Article 39(5).

What is compelling in this definition is firstly that it is limited to constitutional purposes only. Meaning that what constitutes peoples serves to inform the purpose of the constitution only and the drafters did not want to provide a general definition. Secondly, the definition links the existence of a nation, nationality or people to territory. This definition would exclude irredentist claims to the territory, because the peoples would have to inhabit the territory currently, thus no right of secession would be possible without being present on the contiguous territory. Thus, the first substantive condition that needs to be satisfied before the right would be available is that of being a nation, holding nationality or being peoples with a direct link to the territory.

Article 39(1) entrenches the right to secede by stating that 'Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession'. This provision does not follow the presumption of many scholars that the right to self-determination is synonymous with the right to secede.[222] It is possibly a manifestation of the no-fault model, in that access to both rights are deemed to be 'unconditional'. Article 39 (2) is a general reflection of Buchanan's Primary Right Theory and specifically the Ascriptive Rights Theory.[223] This article reflects the drafters of the constitutions' sensitivity to the diverse ethnic situation within Ethiopia. The right to secede serves to safeguard the protection of peoples' rights to the history, development, promotion, preservation and expression of their culture. The inclusion of this article serves to provide the right to secede with a substantive character that in turn enhances the exercising of the unconditional right to secede.

The five procedural conditions needed to affect the exercise of both rights are set out in article 39(4). These conditions seem to be quite similar to those, which were present under the Burmese constitution.[224] They can be summaries as follows:

[222] The following chapter will in-depth interrogate the relationship between the right to self-determination and the right to secede.
[223] (n 79) supra.
[224] See (n 204) supra.

(a) the legislative council of the group concerned needs to approve the demand for secession by two-thirds majority;

(b) the federal government then needs to hold a referendum within three years of receipt of the result of the council;

(c) a majority vote is necessary from the referendum held;

(d) the federal government then has to transfer power over to the groups legislative council and;

(e) legislation needs to be enacted to divide asset between the federal government and the seceding group.

The critical difference between the procedural conditions within the Ethiopian constitution and that in the Burmese constitution; is that the Burmese provision stipulates that the whole process of secession be subjected to the enactment of legislation. In the Ethiopian case, it is only the division of assets that are subjected to the promulgation of legislation. Subsequently, the legislator is exclusively limited to pronounce on issues relating to succession. As an element of a process of secession, the claim needs to be followed by a two-thirds majority vote to succeed. The constitution also provides for the establishment of the element of effective control via referendum, for which a majority vote is the requirement. Recognition as a requirement is satisfied by the federal government itself, by handing over power to the seceding entity. This also legitimises the establishment of the new entity under international law. The process of recognition by other states is also simplified.

Habtu makes two fundamental distinctions between the examples of the USSR, the SFRY and Ethiopia. Firstly, he points out that the collapse of the federations of the USSR and SFRY can be attributed far more to the collapse of communism than the recognition of the right to secede.[225] His second point is that the Communist Party controlled the ethnic autonomy of these two federations. Within the Ethiopian

[225] Habtu (n 218) 317.

context, the ruling politically party - the Ethiopian People's Revolutionary Democratic Front would not be able to execute such power. The party is a multi-party coalition of different ethnic groups and not a monolithic party such was the case within the USSR and SFRY. Habtu also suggests that political plurality is central to Ethiopian politics, with seventy-two registered political parties[226], unlike the situation in the USSR and SFRY. The right to secede has not been tested under Ethiopian jurisprudence, however the constitutional positioning and progressive drafting of the right as well as the peaceful withdrawal of Eritrea[227] leaves room for optimism.

3 4 The Quebec Proposition

Within a democratic constitutional dispensation, any secessionist aspiration aims at constitutional change. Where secession succeeds, it impacts the constitutional account of a state's sovereignty and territory profoundly. A brief synopsis of the *Quebec case* will give context to this argument. In this case, the Canadian Supreme Court dealt with secession within a constitutional context. After the 1995 referendum relating to the question of the province of Quebec's political and economic secession from the federal state of Canada, several issues arose. These mainly related to disagreement over how the questions for the referendum needed to be phrased. Consequently, after the secessionists claim failed in the referendum, the Governor Council submitted three questions to the Canadian Supreme Court. The court was approached to exercise its power to give an advisory opinion pursuant to section 53 of the Canadian Supreme Court Act.[228] The three questions which were posed to the court where:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

[226] This figure as present from Habtu's 2004 figures. With the 2010 election the Ethiopian Electoral Board had seventy-nine registered political parties. <http://www.electionethiopia.org/en/political-parties.html> accessed 05 June 2012.
[227] See in general, Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (adopted d and entered into force 12 December 2000) 40 ILM 260 (2001)
[228] Supreme Court Act, R.S.C., 1985, c. S-26.

2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?[229]

The court answered the first two questions in the negative, although in particular detail. Further the court concluded that there was no need to entertain the third question considering that the answer to the first two questions were negative. In the formulation of its arguments the court grounded itself in Canada's four fundamental organising constitutional principles, these are federalism, democracy, constitutionalism and the rule of law.[230] However, the court indicated that this is not an exhaustive list, but only the constitutional principles relevant to answer the questions before it.

Based on the reasoning of the Supreme Court, the court seems to suggest a derived constitutional duty to negotiate in a functional democracy, such as Canada. This lead to a conclusion that a general principle of law has developed under Canadian constitutional jurisprudence. This duty to negotiate stems from the constitutional principles and the origin of the state. As a source of international law 'general principles of law recognised by civilized nations',[231] is positive law. Shaw describes general principles of law as:

[229] *Quebec case* (n 25) para 2.
[230] ibid para 32.
[231] Dugard, *International Law* (n 49) 24. Shaw, *International Law* (n 24) 92. R Wallace and O Martin-Ortega, *International Law* (6th edn, Sweet & Maxwell) 23. This is also confirmed in Article 38(1) of the Statute of the International Court of Justice.

> [W]here the court in considering a case before it realises that there is no law covering exactly that point, neither parliamentary statute nor judicial precedent. In such instances the judge will proceed to deduce a rule that will be relevant, by analogy from already existing rules or directly from general principles that guide the legal system, whether they be emanating from justice, equity or consideration of public policy.[232]

The court in the *Quebec case* was faced with such a dilemma and consequently followed the proffered approach. Firstly, the court could not draw from statute or judicial precedent as to how to approach the secession issue in the context of the three questions before it. The reasoning of the court is in its understanding of the formation of the federal state, the constitutional principles and the political democratic order. These factors according to the court, originate from negotiations, this negates to a duty to negotiate. The court found this duty to rest primarily on the majority. The court stated that, 'At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation'.[233] The court declared that the Constitution Act of 1982, acknowledges a right of each of the parties within the Canadian federation to initiate constitutional change or amendments. It is via this right that a coinciding duty to negotiate exists.[234] The court proclaimed this duty inherent to the constitutional principle of a federal party to initiate changes to the constitution.[235] This duty informs the substantive character of the right to initiate constitutional amendments. Buchanan perfectly summarises the logic of the argument being raised in this regard. He states that:

> [S]ecession is a profound constitutional change, not a matter to be decided by a simple majority vote in the seceding region, and that as such

[232] Shaw, *Title to Territory in Africa* (132) 93.
[233] *Quebec case* (n 25) para 68.
[234] Before the enactment of the Constitution Act, 1982 the Canadian federal government could acquire a groups right to a territory without consent of that group. See J Barrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002) 108 -109.
[235] *Quebec case* (n 25) para 69.

> it must be achieved by constitutional amendment through a process of negotiation.[236]

If this logic is followed, even if a constitution does not possess a right to secede, any constitutionally organised democratic state remains open to the potential of secession. This is what I term the Quebec proposition. Inherent to constitutional rule is the enduring spirit of the constitution and a duty to negotiate would inform that spirit. Consequently, if such negotiations results in disintegration, it would follow that the right to secede is potentially inherently present within all constitutions. The right then follows this duty to negotiate within constitutional states. A broad view would then be that international law would have to recognise the right to secede as a general principle inherent in democratic constitutional states.

Returning to the process of secession, the court in the *Quebec case* extensively dealt with the issue of the principle of effectiveness. In commenting on the principle of effectiveness, Crawford concludes that 'The question of the eventual effectiveness of an attempted secession is quite different from the question whether an entity has a right to independence'.[237] Effective control over a territory still needs the legitimacy of a right to justify secession. Under the Quebec proposition, the right can still be established if effective control is proven within a constitutional dispensation. This leads to another vexing question, whether the domestic court did not usurp the jurisdiction of an international tribunal, like the ICJ or an arbitration tribunal by ruling on this matter.

Where a municipal constitution does guarantee a constitutional right to secede, can it be concluded that the domestic courts are the most appropriate forums to address secession? Can it be justifiably argued that a domestic court can sanction the disintegration of a state? This seems problematic, both when the court bases it on a

[236] A Buchanan, 'The Quebec Secession Issue: Democracy, Minority Rights, and the Rule of Law' in Macedo and Buchanan (n 15) 239.
[237] Crawford, 'The Right to Self-determination (n 21) 52.

direct constitutional right to secede or a derived (negotiated) right to secede. If the power to legitimise disintegration is granted to an unelected sphere of government, like the courts, this could hold problems for both municipal and international law. None of the examples above, where a codified constitutional right to secede existed referred to judicial intervention. Mutual to all of the examples was the attempts to gain procedural legitimacy through an appeal to the populace via referendum. This seems like a more viable and equitable direction to follow.

The judgement in the *Quebec case* is significant for constitutional theory and more so for international law, in that it brings a new dimension to the potential of secession. Proposing to bring a right to secede within a constitutional dispensation demands an interrogation of the impact and relation of such a right with the constitution as the supreme law. In the *Quebec case*, the court explored this relationship in the context of the Canadian constitution and proposed a minimum standard for the realisation of a right to secede. This minimum standard is reflected in a constitutional duty to negotiate when faced with secessionist claims. This minimum standard becomes a general principle of law and herein lies its relevance for international law.

Under the Quebec proposition, the legality of secession is moot and still needs to be determined after negotiations. However, the process of negotiation provides the legitimacy to entertain the matter. The court reflected that in their 'constitutional tradition, legality and legitimacy are linked'.[238] The legality of the conduct of the majority government is based on their respect for the rule of law and the application of the constitutional principles. In terms of the process of secession and the element of recognition, the court stated:

> Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's

[238] *Quebec case* (n 25) para 33.

> claim to legitimacy which is generally a precondition for recognition by the international community.[239]

The court correctly links the legitimacy of the majority population, to their respect for the constitutional duty to negotiate. The value here for comparative constitutionalism is that a duty to negotiate would always be a constitutional tool for resolving national disputes in accordance with the rule of law. No democratic constitutional order is the fruit of a dictatorial or fascist system and thus this duty should manifest itself throughout constitutional jurisprudence. The value of this approach for international law is that a general principle amongst constitutional states could develop which will find application under international law.

This approach by the Canadian Supreme Court of a duty to negotiate is reconcilable with international law. Consequently, the court's reasoning can be applied to establish that international law supports the entrenchment of a right to secede within the municipal jurisdiction. Article 33 (1) of the UN Charter states that:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation (…) or other peaceful means of their own choice.

According to Article 33 (2) of the UN Charter the UN Security Council is also under a legal duty to call upon states to use negotiations as one of other means to settle disputes. This point links to the argument that ran through the previous chapter, that international law favours the principle of stability. Further, the central logic of a duty to negotiate under international law is the maintenance of international peace and security, which is the main purpose of the UN.[240]

[239] ibid para 103.
[240] Article 1(1) of the UN Charter.

In the *Aerial Incident of 10 August 1999 case*[241] the ICJ reiterated this approach, by reminding the parties of their duty under Article 33(1) that there was an obligation on both India and Pakistan to resolve their international dispute by peaceful means. Negotiations were cited as one such express peaceful means.[242] Further, in the *Gabčíkovo-Nagymaros Project case*,[243] it was the majority order of the court that 'Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation'[244] A practical example of this duty to negotiate flows from the South African liberation movement. In this example, the international community applauded the formation of a new dispensation exercising this duty to negotiate. Botha describes this process as follows:

> South Africa's political transition thus belongs to that contemporary breed of transitions described by Arato as 'negotiated revolutions'. It also qualifies as 'legal' or 'Rechtsstaatliche' revolution in the sense that, far from representing a total break in legality, it was adopted in accordance with procedural – and substantive requirements contained in an interim Constitution[245]

Botha's reflections on what he calls the 'constitutional-making experiment'[246] links well with this approach of a constitutional duty to negotiate enunciated by the court in the *Quebec case*. However, for the achievement of legal certainty that would not in Botha's words, represent a break in legality, a clearly drafted and defined right to secede is still favoured.

With reference to the Canadian Supreme court's decision in the *Quebec case*, the court proposes a procedure that seems to simulate a form of constitutionalising of the secession process. The court moves from the premise that secession cannot be

---

[241] *Aerial Incident of July 27 1955 Case (Israel v Bulgaria)* [1960] ICJ Rep 146.
[242] ibid paras 53-55.
[243] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7.
[244] ibid p.83.
[245] H Botha, *Instituting Public Freedom or Extinguishing Constituent Power? Reflections on South Africa's Constitution-Making Experiment*, (2010 Juta) V.26 SAJHR Part 1.
[246] ibid.

decided by a simple majority vote, but that it needs to be decided by a process of constitutional amendment and negotiation. The court does not outline the substance or form that these amendments need to have. However, it could be argued that it is not necessary because it would in any case form part of the negotiation process. The Canadian Supreme Court concludes that:

> The notion that what is not explicitly prohibited is implicitly permitted has little relevance where (as here) international law refers the legality of secession to the domestic law of the seceding state and the law of that state holds unilateral secession to be unconstitutional.[247]

3 5 Concluding Remarks

The need for a shift in perspective on the process of secession, which Roach[248] argues for, seems to hold some merit. A move away from an over fixation on the moral justification of secession does not seem to discredit the substantive grounds for secession, but could be observed to enhance it. There is a need to develop the procedural legitimacy of the right to secede. Just including the right in a constitution does not solve the problem of the legal effectiveness of the right. Developing the normative procedural character of the right not only promotes legal certainty, but also the guiding principles of international law of stability as well as peace and security.

It is acknowledged that constitutionalism is a product of the regime in place and the will of the peoples is predicated on the notions of popular and state sovereignty. Roth points out that:

> While constitutionalism – a commitment to establish, maintain, and respect a broadly acknowledged framework for the legitimate exercise of power – is undoubtedly a crucial political virtue, the same cannot automatically be said for adherence to any particular constitutional norm or even the whole

[247] *Quebec case* (n 25) para 143.
[248] Roach (n 145) supra.

> constitution. Existing constitutions are artefacts of past power struggles and negotiated settlements.[249]

What is proposed in the Quebec proposition, is that a codified right to secede must be born from a negotiated settlement. The duty to negotiate is the path that international law should be favouring in establishing any form of a constitutional right to secede. Peaceful negotiated solutions to the incidence of secession are favoured and this would also bring secession closer the tacit principle of stability. It is clear that domestic entrenchment of the right makes it vulnerable to political manipulation. The examples of the former Soviet Union, Burma and the former Yugoslavia provide evidence of how the municipal inclusion of the right served to pacify it. By altering the framework suggested by Shaw above, from a process of claim, effective control and recognition to a process of claim, negotiation, effective control and recognition, the strategic and legitimising function of secession will be enhanced. Secession is consequently also easier to harmonise within the ambit of international law and the rule of law.

From all of the constitutional examples of a codified right to secede, Ethiopia presents the best example. The right is comprehensively drafted to harmonise with legal theory. It is judicially applicable to the extent it includes both substantive and procedural legal characteristics. These results will serve to inform the debate relating to the relationship between secession and the right to self-determination. The right to secede and self-determination are often used inter-changeably. The normative nature of the right to self-determination is well developed under international law, to the extent of being an erga omnes[250] norm of international law. An understanding of the challenges and successes of the right to self-determination under international law will serve to inform the development of the right to secede. The following chapter will conduct an in depth analysis of this relationship.

[249] Roth (n 153) 439.
[250] *East Timor Case* (n 125) para 29.

4 Self-determination and Secession

4 1 Introduction

This chapter explores the relationship between the rights to secede and self-determination. The principle of self-determination seems to not contradict the right to secede, but rather potentially enhance the right. The right to secede exist both separate and integral to the right to self-determination. Consequently, self-determination informs the central objective of that which secession aims to achieve – the creation of a new territorial entity under international law. The research demonstrates that the right to self-determination has historically been the inherent justification for the establishment of all states. Further, the chapter discusses the different forms of the right to self-determination – this being internal and external self-determination.

The nature of the right to self-determination remains complex. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case* (hereinafter the *Palestinian Wall case*),[251] the ICJ had another opportunity to either develop or clarify the boundaries of the right to self-determination. This case was loaded with both political and humanitarian issues and this probably impeded the court's focus in dealing with the particular legal issues. Consequently, the court in its opinion limited itself to the particular legal question before it.[252] This case serves as contemporary evidence of the complexity that still engulfs the right to self-determination.

[251] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) General List No. 131 [2004] ICJ Rep.

[252] ibid. See minority declaration by Judge Buergentha, para. 1-10. These divisions become particularly clear on investigating this declaration; where the honourable dissents from the court's decision to render an opinion and hear the matter. He comes to this conclusion and cannot disassociate himself from the heavy political and legal questions. The honourable judge specifically focuses on the balancing of the right to self-determination and the right to self-defence (Article 51 of the United Nations Charter). He argues that the court did not have enough information in front of it to sufficiently deal with the matter correctly.

The rationale for the inquiry into the right to self-determination as part of the study of the right to secede, is two-fold. Firstly, self-determination allows for the potential of secession when a peoples' will is directed toward state formation. As a consequence of the total depletion of terra nullius, this direction will inevitable always take the format of secession. Secession or a positive entitlement to secede is reconcilable with external self-determination. Consequently, the reference to secession in the contexts of self-determination is limited to this form. Secondly, the right to self-determination historically faced similar challenges and opposition as the right to secede endures. The process of development that the right to self-determination undertook could potentially be of value to the right to secede. Both rights share a normative character that is much closer than other concepts of international law.

The results in this chapter brings to the fore the core argument which inform the normative character of the right to secede. The chapter builds on the previous chapter in retaining the position of a shift in the perspective on the process of secession. This is undertaken through the departure from the traditional approach[253] of secession towards a more normative approach.[254] An approach which reflects more than the moral legitimacy of secession. Jovanović highlights a similar approach in stating that:

> From the 1980's onward, political philosophers have offered a more rigorous treatment of the phenomenon of secession, concentrating largely on moral justifications of the *unilateral* right to secession.' In doing so, they have been more interested in justifying a *moral claim-right* to secede, which implies 'a correlative obligation on the part of others not to interfere with the attempted secession', than in grounding a *moral liberty-right* or a mere permission to secede.[255]

[253] In what I phrased the 'tradition approach', the right to secede is predominantly considered based on its moral justification. This has left the right stagnant and has contributed to the under development of the right to secede in the face of multiple secessions around the world.
[254] The normative approach which is again my own phrase, considers a right to secede based on its representation primarily to the extent that it is legally relevant. The right is weight within the legal paradigm and an observation is entered into on it legal substantive and procedural nature.
[255] M Jovanovic, 'Can Constitutions be of use in the Resolution of Secessionist Conflicts?' (2009) 5(2) Journal of International Law and International Relations 59-60.

It is suggested in this chapter that the development of the right to self-determination's from legal anomaly, to principle, to right is of some utility. It is submitted that it is precisely this subscription to an unstable concept such as morality, which is primarily responsible for the opposition to the right to secede. The historical development of the doctrine of self-determination is briefly touched on in order to weave together its essential characteristics. The interplay between self-determination and territorial integrity is then interrogated. The doctrine of respect for territorial integrity as a norm of international law is directly challenged by the existence of a right to secede. However, it is suggested that it is a passive principle that serves only as a defence to the disruption of a state's territory. This is contrary to the dominant view on this relationship. Summers argues in terms of secession, self-determination and territorial integrity that:

> The self-determination of groups within states can be divided in three areas: secession, autonomy and internal self-determination, and remedial secession. The legal position of the first of these, secession should be straightforward. The principle purpose in balancing self-determination with territorial integrity has been to restrict the possibility of secession.[256]

This proposition assumes that the right to self-determination includes the consequence of secession automatically. It ignores the fact that the right to secede potentially can exist independently from the right to self-determination. Further, it does not consider that a right to self-determination can broadly be present outside the link to a particular territory. However, a right to secede cannot be evoked without a link to a specific territory.

The chapter proceeds to discuss the doctrine of uti possidetis and its impact on self-determination. Uti possidetis is a norm of international law based on consent and agreement. It is submitted that uti possidetis is an inferior concept to self-

[256] J Summers, *Peoples and International Law: How Nationalism and Self-determination Shape a Contemporary Law of Nations*, (Martinus Nijhoff Publishers 2007) 333.

determination. Consequently, it cannot legitimately bar the operation of a right to self-determination as an erga omnes norm of international law.[257]

The chapter is concluded by introducing the concept of constitutional self-determination. Chapter 2 focused on the right to secede and its incorporation into domestic constitutions. The aims were, to track whether this endowed the right with increased legitimacy and, whether the right could be reconciled with a progressive approach as suggested by Shaw above.[258] A similar logic follows the inquiry below into constitutional self-determination. However, the inquiry is more theoretical in order to engage with the different manifestations of constitutional self-determination.

4 2 The Moral Authority of Self-determination

4 2 1 Classical Self-determination

It is prudent to engage in a discussion on the classical perspectives of the right to self-determination. This serves to create a better understanding of the developing character of the norm. There has been consistent resistance on the part of state parties to the full recognition of self-determination as a right.[259] This can primarily be attributed to the classical perspective on self-determination. Danspeckgruber explains that:

> [S]elf-determination in its classical form, that is, the search for independence, new boundaries, and statehood (and hence traditional nationalism) played a powerful role in the destruction of Europe's empires in the twentieth century.[260]

[257] *East Timor case* (n 125) para 29.
[258] Shaw, 'Title to Territory in Africa' (n 132).
[259] H Hazewinkel, 'Self-determination, Territorial Integrity and the OSCE' (2007) 18:4 Helsinki Monitor: Security and Human Rights 290.
[260] W Danspeckgruber, 'Self-determination and Regionalization in Contemporary Europe' in W Danspeckgruber (ed), *The Self-determination of Peoples: Community, Nation, and State in an Interdependent World* (Lynne Rienner Publishers, Inc. 2002) 167.

Brownlie suggests that 'Until recently the majority of Western jurist assumed or asserted that the principle had no legal content, being an ill-defined concept of policy and morality'.[261] This position was held even though the principle of self-determination resonated in both international and regional legal instruments. In the *Kosovo Opinion*,[262] the court stated that, 'one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination'.[263]

Under Articles 1(2)[264] and 55 of the UN Charter, the right is entrenched as a mechanism to affect the UN objectives of friendly relations amongst states and universal peace. Jurisprudence on self-determination developed by the ICJ with especially the *Western Sahara case*[265] and the *South West Africa case*[266] respectively provided legal content to the principle. Further the common articles 1 of the International Covenant on Civil and Political Rights (hereinafter ICCPR)[267] and the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR)[268] expressly recognises the right to self-determination. Under these treaties, the right became increasingly entrenched as a people's right and an erga omnes norm of international law.

A conclusive example of the international community's commitment to the right to self-determination was captured in the UNGA's Declaration on the Occasion of the Fiftieth Anniversary of the United Nation which pronounced that member states:

> [C]ontinue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of people under colonial or other forms of alien domination or foreign occupation, and recognise the right of

[261] I Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press) 580.
[262] *Kosovo case* (n 4) para 173.
[263] ibid para 82.
[264] Article 1(2) reads; 'To develop friendly relations amongst nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'.
[265] *Western Sahara case* (n 100) supra.
[266] *South West Africa case* paras 52-53.
[267] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[268] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

> peoples to take legitimate action in accordance with the provisions of the Charter of the United Nations to realize their inalienable right of self-determination.[269]

This confirmation of the right to self-determination came without the stipulation of respect for territorial integrity. The UN General Assembly again wanted to emphasis the point that the recognition of the right to self-determination should not be construed as giving a people access to secession. The declaration explicitly stated that:

> This shall not be construed as authorising or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole of the people belonging to the territory without distinction of any kind.[270]

Regionally, both in Africa and Europe the right to self-determination found recognition. Perhaps more emphatic is the formulation in the African Charter on Human and Peoples' Rights (hereinafter ACHPR) which provides under Article 20 (1) that:

> All peoples (…) shall have the unquestionable and inalienable right to self-determination, to freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

[269] United Nations General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nation (adopted 9 November 1995) GA res. 50/6.
[270] ibid.

In African Legal Aid v The Gambia[271] the African Commission on Human and Peoples' Rights (hereinafter the African Commission) denounce the military coup d'état as 'not through the will of the people' and 'therefore a grave violation of the right of Gambian people to freely choose their government as entrenched in Article 20(1) of the Charter'.[272]

Within the European context, the right to self-determination is recognised in the Final Act of the Conference on Security and Co-operation in Europe (hereinafter the Helsinki Final Act),[273] where it comprehensively states:

> The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.[274]

Developments in the classic view of self-determination brought about the distinction between two types of the right to self-determination, being internal and external self-determination.[275] The Helsinki Final Act gives recognition to internal self-determination as being:

> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.[276]

---

[271] *African Legal Aid v The Gambia* (2000) AHRLR 119 (ACHPR 2000).
[272] ibid, para 73.
[273] Conference on Security and Co-operation in Europe Final Act, Helsinki, 1975 (adopted 01 August 1974) 14 ILM 1292 (1975).
[274] ibid. See part viii.
[275] These two variants of the right to self-determination are separately discussed below. See, Quebec case (n 25) para 126.
[276] Helsinki Final Act (n 272) part viii.

External self-determination seeks to use the right to self-determination in order to remove territory from a sovereign state. Secession finds logical application under the expression of the right to external self-determination. This would only be the case where the expression of the people's will is directed towards the creation of a new state. Peoples also have the option of integration or association as alternative expressions of the right to external self-determination.

In the context of the UN Charter, it is generally presumed that self-determination as expressed in the instrument, relates to a peoples' right. Most commentators argue comfortably that self-determination as a developing norm is a collective peoples' right present within the above-mentioned articles of the UN Charter.[277] Higgins vigorously opposes such views. She argues that 'We cannot ignore the coupling of "self-determination" with "equal rights" – and it was equal rights of states which were being provided for, not of individuals'.[278] Higgins does not support the view that the developed right to self-determination is supported by these articles in the UN Charter. Higgins further emphasises that 'self-determination is not provided for by the text of the UN Charter – at least not in the sense that it is generally used'.[279]

Musgrave presents a counter argument that 'No definitive demarcation between self-determination as a political concept and self-determination as a legal right can be found in the Charter of the United Nations'.[280] He argues that herein, lies the controversy as to the scope and content of the right. The pertinent question that arises is, what is the difference between self-determination as a political concept and a legal right. Brownlie's point that the right is ill defined, seems to have relevance because of such diverging views.

[277] Musgrave (n 173) 90; Brownlie (n 260) 581.
[278] R. Higgins, *Problems and Process: International Law and how we use it* (Claredon Press 1994) 112.
[279] ibid.
[280] Musgrave (n 173) 90.

The history of self-determination cannot be detached from the moral grounds, which informed its development. The morality of self-determination is couched in the unassailable right of peoples to be in control of their political status and free from foreign domination. This moral position also informed the use of self-determination as the leading rationale to guide the process of decolonisation. The moral justification for self-determination has consequently contributed to its development into a right and norm of international law. However, these same aspects of morality are loaded with political motives. The moral justification for self-determination is clouded in political reasoning and this makes it vulnerable to political intrusion. Crawford expresses caution when he remarks that 'Lawyers should not make political judgements; they should make legal judgements'.[281] Crawford with reference to the *South West Africa case*, argues that 'For the court to decide that the application of apartheid to South West Africa was (or was not) inconsistent with the mandate would involve a political judgement'.[282] Consequently, the difference between self-determination as a political concept and a legal concept lies in its morality. The morality of self-determination drives it politically, however morality is also responsible for it substantive legal existence.

The presence of self-determination is not foreign to the process of state-formation. Aspirations for self-determination, although not specifically defined, had an application in early nationalist movements that was aimed at state creation. This was evident before the decolonisation process of the early twentieth century. Koskenniemi brings a clear understanding of self-determination in this context where he argues that:

> This idea of national self-determination as a patriotic concept, a justification of statehood, has not always been apparent. Much of the classical positivist writing has simply accepted States as the factual foundation of international law.[283]

[281] Crawford, 'The Right to Self-Determination' (n 21) 18.
[282] ibid.
[283] M Koskenniemi , 'National Self-determination Today: Problems of Legal Theory and Practice'. (1994) 43:2 International and Comparative Law Quarterly 245

Koskenniemi uses the 1920 opinion of the International Commission of Jurists on the Äland Islands as evidence of this view that self-determination serves as justification for existence of all states. He postulates that self-determination is ordinarily dormant, restricted by sovereignty and that 'During periods of political transformation, however, when the existence of States becomes uncertain, self-determination becomes applicable to reconstitute the political normality of statehood'.[284] Thus, self-determination is not only the driving force behind the establishment of the state, but it is also one of the core requirements for the maintenance of state legitimacy. This represents the patriotic side of self-determination.

Koskenniemi furthermore presents the side of self-determination that challenges statehood and its patriotic side. This is the perspective of self-determination that places communal interest or a peoples' desire to be associated and grouped as one, central to the expression of self-determination. He argues that this is the position of self-determination that opinions such as the Äland Islands have tried to downgrade as not legal but political and a danger to sovereignty as well as the principle of stability in international law. More specifically Koskenniemi argues that 'Following the Äland Island Opinion, jurist have attempted to contain this (secessionist) sense of self-determination by limiting its application to the particular contexts of decolonisation'.[285] However, the patriotic perspective of self-determination clearly indicates the rights existence outside of the realm of colonial rule.[286]

This dual perspective of self-determination also presents inherent contradictions. Under the colonial context, the right to self-determination has presented itself as a fundamental right of international law. The extent of the right's entrenchment as a norm under international law is generally accepted as being elevated to jus cogens. International lawyers frequently disagree as to the scope and application of the principle. However, whether dealing with internal or external self-determination a few

[284] ibid 246.
[285] ibid 247.
[286] Colonisation is clearly defined as 'Alien subjugation, domination and exploitation'; See The Declaration on the Granting of Independence to Colonial Countries and Peoples, (adopted 14 December 1960) GA res. 1514 (XV) para 1.

certainties have been established to serve as departure points. Cassese summaries them in stating that:

> Self-determination appears firmly entrenched in the corpus of international law in only three areas: as an anti-colonialist standard, as a ban on foreign military occupation, and as a requirement that all racial groups be given full access to government.[287]

4 2 2 Scope of Self-determination

A brief discussion of the scope of self-determination serves to broaden the conceptual analysis and comprehension of self-determination. This also provides clarity on the status of the scope of self-determination. As stated above, there are two different forms of self-determination. At the conservative end of self-determination lies internal self-determination and on its extreme side external self-determination. As indicated above secession only concerns itself with external self-determination. This form of self-determination is the only one that possesses the potential to include secession. These different forms of the right to self-determination emerge from the authority of the Declaration on Friendly Relations. The declaration discourages external influence in the expression of a form of self-determination. Reflecting back on Higgins' argument above that self-determination as presented within the context of the UN Charter is a right of states and not people, this clearly also contradicts such a narrow reading of self-determination in the instrument. Instrument such as the Declaration on Friendly Relations serves to provide for a broader interpretation of self-determination within especially the ambit of the UN Charter. The declaration clearly states that:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State

[287] A Cassese, *International Law* (2nd ed, Oxford University Press 2005) 61.

> has the duty to respect this right in accordance with the provisions of the Charter.[288]

External self-determination, according to the declaration, can be express via 'the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status'.[289] Consequently, secession is not the default effect of an expression of the right to external self-determination. Internal self-determination finds greater relevance within the protection of minority and indigenous rights. In the *Quebec case*, the court held that internal self-determination is 'a people's pursuit of its political, economic, social and cultural development within the framework of an existing state'.[290] Internal self-determination forms the departing point for the expression of the right to self-determination. Access to external self-determination is subjected to the denial of internal self-determination.

Another vexing question under international law is who has access to self-determination. In its preamble, the Declaration on Friendly Relations pronounces the progressive development and codification of 'the principle of equal rights and self-determination of peoples'.[291] It is generally accepted that self-determination is a peoples' right, but what constitutes peoples remains unanswered under international law. The research conducted here is not aimed at answering this question. The focus is with the question, what constitutes a peoples' will?

4 2 3 A Peoples' Will

The traditional approach to the right to secede postulates that the justification for the existence of the right to be based on its moral value. The right to self-determination also follows a path that commenced within its morality. From the pronouncement of

[288] Declaration on Friendly Relations (n 52) supra.
[289] See also *Western Sahara case* (n 100) para 57 and 58.
[290] *Quebec case* (n 25) para 123-4.
[291] Declaration on Friendly Relations (n 52) supra.

American president Woodrow Wilson's[292] 'Fourteen Points', self-determination developed from a concept to a principle, to a doctrine into a right, which now serves as a norm of international law.[293] However, the application of the right has been ad hoc rather than meticulously planned under international law. In the *East Timor case*, the right was elevated and confirmed as having an erga omnes character. The judgement stated that 'In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable'.[294] In contrast, the ICJ avoided making a pronouncement on the right's status for the peoples of Kosovo in the *Kosovo Opinion*. This seems to point to a contradiction under international law on the comprehension of the right. In what Crawford terms the 'Lex Lata, Lex Obscura' he argues the above point by suggesting that 'we have the paradox that the international law of self-determination both exists and is obscure'.[295]

In the *Western Sahara case*, the court found that 'the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.[296] This reasoning was also followed in the *South West Africa case*. In response to South Africa's submission that the people of Namibia wanted to be incorporated into South Africa, the court ruled that 'South Africa would have vindicated itself in the eyes of the world and in the estimation of the peoples of South West Africa, whose freely expressed wishes must be supreme'.[297] These two decisions highlight two central aspects of the normative character of the right to self-determination. Firstly, that self-determination is the free and genuine expression of the will of peoples and secondly, that such expression is supreme (erga omnes).[298]

The moral value of the principle of self-determination, is captured in the question, why a right to self-determination? The morality of a right to self-determination leads

[292] See Musgrave (n 173) 22-24.
[293] *East Timor case* (n 125) Para 29.
[294] ibid.
[295] Crawford, 'The Right to Self-determination (n 21) 10.
[296] *Western Sahara case* (n 100) para 55.
[297] *South West Africa case* (n 54) 65.
[298] My own emphasis. See *East Timor case* (n 125) Para 29.

to two conceptual ends; the holder's moral authority to access the right and the moral obligation of others, to respect its existence and exercise. Buchanan expresses it more clearly that 'To have a moral right to something is to have an especially strong moral power or moral authority'.[299] He further argues that 'the implication being that the obligation of others not to interfere with one's (…) right is a very weighty obligation'.[300] The right to self-determination should be a supreme, genuine and free expression of will, as a peremptory norm of international law. The moral authority of the right falls with peoples who qualifies for the right. International law has elevated the rest of the world's moral obligation to respect the right into statute and judicial precedence.

The exercise of peoples' will consequently attaches legal legitimacy to the right to self-determination. The expression of the right can be towards different ends. State creation is just one option of the exercise of the right. Principle VI of UN General Assembly Declaration 1541 (XV)[301] provides that some of the options for the exercise of the right is integration, free association or political independence. The right to secede seeks to move further and premises its morality squarely on a similar but specific right to political independence. Koskenniemi contemplates this point to be that:

> The secessionist sense of self-determination builds upon a romantic or a rousseauesque approach. It tries to look deeper into nationhood as something more basic, more fundamental than mere decision-processes. For this view, the crucial question is less how popular will is exercised; more to what end it is exercised.[302]

Thus, it is submitted that the expression of will is one side of the coin. However, secession concerns itself with the other side of this coin – begging the question, to

[299] Buchanan, *Secession* (n 1) 27.
[300] ibid.
[301] Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter (adopted 15 December 1960) GA res. 1541 (XV)
[302] Koskenniemi (n 282) 241-269.

what end is the will expressed. The critical element is the presence of secession within self-determination and its singular aspiration for political independence. As argued above self-determination is inherent in the process of state creation. Johnston broadens this argument by stating that post secession, 'The nationalism of the state thus reinforces and reproduces the collective sense of identity of its citizens'.[303] The African Commission of Human and Peoples' Rights also confirmed this position in the *Katangese case*.[304] The Commission found additional options towards the expression of a peoples' will. This indicates that the exercise of self-determination is not based on a closed list of options, but that it follows the development in the needs of peoples. The Commission concluded that:

> [S]elf-determination may be exercised in any of the following ways – independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people.[305]

This indicates that secession is one of many options in a peoples' expression of their will under the right to self-determination. These complexities and variations in the exercise of the right are also present in its scope of meaning. Weller affirms that it is:

> True, self-determination has numerous layers of meaning, which include a right to democratic participation for individuals, certain human rights entitlements for minorities and additional benefits for indigenous peoples.[306]

The correlation with secession however, concentrates the objective of self-determination to one ideal only – state formation. Weller criticises the relationship between self-determination and secession in that 'at the sharp end, where opposed unilateral secession is concerned, the doctrine in its simplicity has exacerbated

[303] R Johnston, D Knight and E Eleonore Kofman (eds), *Nationalism, Self-determination and Political Geography* (Croom Helm Ltd 1988) 8.
[304] *Katanga case* (n 124) supra.
[305] ibid para 4.
[306] Weller (n 17) 14.

conflict, rather than helping to resolve it'.[307] To whichever end self-determination is expressed, primary to its application is the recognition of the will of the peoples. Buchanan concurs with the approach in stating:

> [I]nternational law must be transformed by the recognition that self-determination admits of degrees and, consequently, that the exercise of a right to self-determination may take many forms, with secession to form a fully independent, sovereign state being only the most extreme.[308]

The incorporation of the right to self-determination into international legal instruments has been accompanied by respect for the principle of territorial integrity.[309] In chapter 2, the rational of this was linked to international law's adherence to the principle of stability and maintenance of the status quo. It was concluded in chapter 2 that all the definitions of secession propose a disruption of a states' territorial integrity. The statutory qualifications on the absolute exercise of the right to self-determination by the international community, in general could be ascribed to the potential disruptive consequence of secession on territorial integrity. However, the legitimacy of self-determination cannot be detached from the lawful aspirations of a peoples' will. With the exercise of external self-determination, disintegration cannot be excluded as a possible outcome. Consequently, the question remains whether the recognition of the principle of respect for territorial integrity under international law serves as an absolute bar against self-determination. This theme is further explored below.

4 3 Territorial Integrity

Recognition of the principle of territorial integrity is found in Article 2 (4) of the UN Charter. The Article prohibits the use of force against the territorial integrity or political independence of a state by other states. Territorial integrity underpins the legal obligation which international law generates for every state, to refrain from

[307] ibid.
[308] Buchanan, *Secession* (n 1) 21.
[309] See Declaration on Friendly Relations (n52) supra.

conduct that intrudes on another state's territory. In the *Nicaragua case*[310] the ICJ confirmed that the principle, as phrased in the Declaration on Friendly Relations, 'reflects customary international law'.[311] The Declaration on Friendly Relations articulated territorial integrity to be 'The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'. Territorial integrity works directly towards affirming a state's sovereignty as protected in Article 2 (1) of the UN Charter.

The principle also enjoys regional recognition. In Article IV of the Helsinki Final Act,[312] it is stated that 'the participating States will respect the territorial integrity of each of the participating States'. Further, Article II of the African Charter also reflects recognition for the principle. Within the EC Guidelines on Recognition[313] it stipulates that the 'respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement'.[314] The Montevideo Convention under article 11 also states that, 'The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state'.[315] The right to secede with its primary objective of division of territory stands in contrast to the principle of territorial integrity. In principle, self-determination is accommodative of territorial integrity. However, external self-determination directly challenges the principle.

The principle of territorial integrity has also been realised within various constitutions, in different forms. Consequently, its domestic presence relates to a balancing act with self-determination. Just recently, the inclusion of the right to self-determination within article 1(a) of the Falkland Islands constitution[316] provides an interesting

[310] *Nicaragua case* (n 161) paras. 191-193.
[311] ibid.
[312] Helsinki Final Act (n 272) supra.
[313] EC Guidelines on Recognition (n 201) supra.
[314] ibid. See further L Henkin, RC Pugh, O Schachter, H Smit, *Basic Documents Supplement to International Law: Cases and Materials,* American Casebook Series (3rd edn, West Publishing Company 1993) 62.
[315] Montevideo Convention (n 152) supra.
[316] The Falklands Islands Constitution Order 2008; <www.falklands.gov.fk/assembly/documents/The%20Falklands%20Islands%20Constitution%20Order%202008.pdf0> accessed 12 October 2012.

example of how this right could be understood in a domestic context. Article 1(b) states that 'the realisation of the right of self-determination must be promoted and respected in conformity with the provisions of the Charter of the United Nations'.[317] The UN Charter in Article 2 (4) proclaims the principle of territorial integrity. This is an indirect attempt to include respect for territorial integrity as a consideration in the exercise of the right to self-determination.

The primacy of the principle of respect for territorial integrity over other principles in international law is evident from the restriction that it places on self-determination. However, territorial integrity could serve as a standard for the responsible exercise of the right to self-determination. Territorial integrity protects the legal personality of existing states as subjects of international law. However, it neglects the potential of new states being formed because of the will of peoples. The principle can be observed as a right of states rather than that of peoples. Its approach to statehood is reflective of the maintenance of the Westphalian model. The continuance of the Westphalian model, the adherence to the principle of stability and retention of the status quo is perpetuated through the constraints it places on self-determination. Summers argues that:

> These provisions shift the issue of self-determination away from the existence of people as such towards the representativeness of political institutions. More broadly they can also be seen as an attempt to contain the right by substituting liberalism for nationalism.[318]

Summers' conclusion can be rephrased to state that the attempt to contain the right to self-determination is effected by 'confusing' liberalism with nationalism. In the discussion in chapter 2, on nationalist theory, it became clear that nationalism is constructed on the link between identity and territory.[319] Nationalism is characterised by the promotion of common features of a society to artificially construct a national identity, except in the case of a nation-state. Lesotho and Israel serves as examples

[317] ibid.
[318] Summers (n 254) 333.
[319] Sub-chapter 2 4 1.

of what a nation-state is, where ascriptive features are central to citizenship. National identity becomes the salient link to the territory. Considerations relating to the will of the populace become secondary to the unification of the territory along these nationalist constructs of identity. Liberalism, pragmatically, is open to accommodating popular sentiments related to the territory and the will of peoples. This view is reconcilable with an understanding of self-determination, as being an expression of a peoples' own choice or will. Nationalism seems to be more focussed on the will of a government than that of peoples. In the *Western Sahara case*, the ICJ relied on Mauritania's submission where they argued that:

> [T]hat the principle of self-determination cannot be dissociated from that of respect for national unity and territorial integrity; that the General Assembly examines each question in the context of the situations to be regulated; in several instances, it has been induced to give priority to territorial integrity, particularly in situations where the territory had been created by a colonizing Power to the detriment of a State or country to which the territory belonged.[320]

However, national unity based on nationalist ideology is a precarious approach. Just as nationalism is employed to strengthen national unity, it can be the fuel to ignite internal nationalism sentiments from other groups. Cassese warns that:

> It is common knowledge that we are currently witnessing a dangerous resurgence of nationalism in the world community. The wave of nationalistic and ethnocentric feelings that has recently swept Europe, but can also be discerned in Latin America, North America, and some African and Asian countries, is undermining consolidated State structures and triggering secessionist movements. [321]

[320] *Western Sahara case* (n 100) para 50.
[321] A Cassese, *Self-Determination of Peoples: A Legal Reappraisal, Hersch Lauterpacht Memorial Lectures* (Cambridge University Press 1995) 339.

A problematic paradox is revealed. Nationalism as a mechanism that states employ to foster unity, has become the menace that threatens national unity. As a tool that protected territorial integrity, nationalism could be identified as part of the cause of the disruption of territorial integrity. The difficulty with nationalism and territorial integrity is found within the ascriptive features that aim to string a nationalist identity together. Where the composition of a state is inherently diverse, national identity excludes minorities, primarily because majority trades naturally dominate the national political agenda. Nationalism can then become a threat to ethnically diverse states and can fuel secessionist sentiments. Cassese suggests that:

> One is left with the impression that the traditional multi-ethnic State, that has for centuries constituted the mainstay of the world community, has become effete and probably doomed to demise.[322]

Cassese's warning reflects the dominant reasoning that influences the restriction of the right to self-determination. The utility of nationalism as a mechanism to enforce respect for territorial integrity has failed. Rather the effect has been the opposite, in that it has fuelled secessionist movements. A position can be taken that respect for territorial integrity is not an absolute right of states. In the *Quebec case*, internal self-determination is defined as 'a people's pursuit of its political, economic, social and cultural development within the framework of an existing state'.[323] The same court further explained that:

> A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states.[324]

[322] ibid.
[323] *Quebec case* (n 25) para 126.
[324] ibid para 154.

The Canadian Supreme Court found that access to territorial integrity has to be conditional to the state's respect for its peoples. This places a qualification on a state's reliance for respect of territorial integrity. The applicability of the principle is subject to a legitimate government who recognises the principles of internal self-determination. A circular argument seems to emerge here. The exercise of self-determination is subjected to respect for a sovereign state's territorial integrity. However, the proper functioning of the principle of territorial integrity is subjected to a legitimate government who respects a people's right to internal self-determination. Johanson concurs in suggesting that 'the concept of territorial integrity cannot be understood as guaranteeing the territorial inviolability of states'.[325] The reasoning behind this is that article 2 (4) of the UN Charter only declares that the unauthorised threat or use of force illegally against a state constitutes a violation of its territorial integrity. Further evidence that international law does not unconditionally guarantee respect for territorial integrity is reflected elsewhere in the UN Charter. Under Article 42 of the Charter, the UN Security Council can use force to maintain or restore international peace and security where measures under Article 41 are inadequate. In addition to this Article 51 of the Charter declares self-defence as an inherent right of all states. Thus, a state would be able to use force against the territorial integrity of another state in order to defend itself.

At the core of the relationship between self-determination and territorial integrity is the exclusion of secession as a possible effect of self-determination. In *Katangese case*, the African Commission concluded:

> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question and in the absence of evidence that the people of Katanga are denied the right to participate in government (…) the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.[326]

[325] M Johanson, *Self-Determination and Borders: The Obligation to Show Consideration for the Interest of Others*, (Åbo Akademi University Press, 2004) 61.
[326] *Katangese case* (n 124) para 6.

The African Commission concluded that the peoples of Katanga needed to exercise internal self-determination. This seems to point towards remedial secession as a ground for justifying the infringement of a state's territorial integrity. This argument is limited to cases where internal self-determination is excluded. The basis of this conclusion is the commission's reasoning that the legitimacy of the state would come into question where human rights violations occurred. The judicial test would then be an inquiry into whether there exist a fundamental denial of the exercise and enjoyment of internal self-determination.

Self-determination can only have a legitimate secessionist effect if a balance could be struck with territorial integrity. The *Quebec* and the *Katanga cases* present us with two possibilities. Summers suggests a further solution by stating that 'If states have not been willing to endorse a right of minorities to secede, then perhaps they could accept autonomy within a state'.[327] This solution relates to a broad interpretation of the concept of internal self-determination. Summers elaborates 'Autonomy can be presented as part of the "internal" aspect of self-determination'.[328] An example of the exercising of autonomy within the scope of another state would be Taiwan. However, this solution raises serious concerns relating to the extent of the autonomous power. Further, would the presence of autonomous enclaves not threaten the stability of the dominant state?[329]

In conclusion, the principle of territorial integrity cannot be understood as a norm of international law that is unburdened by responsibility and obligation. This would be a dangerous approach, possible also open to abuse. State sovereignty together with respect for territorial integrity, needs to be subjected to state legitimacy. This legitimacy is strengthened by a state's conduct in recognising and respecting

[327] Summers (n 254) 341.
[328] ibid.
[329] This was one of the arguments presented by South Africa in *Legal Consequences for States of the Constituted Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*. South Africa argued that the existing autonomous and tribal areas within Namibia would serve to threaten the proper exercise of the right to self-determination – in establishing an independent state. See at 63:51.

peoples' right to internal self-determination. The essence of a state's legitimacy is provided by the will of the people and the state's conduct towards the most vulnerable within that society. Brewer's comments on the dissenting voices in the Kosovo Opinion, provides further context on the relationship between self-determination and territorial integrity. He argues that:

> Territorial integrity should not be able to provide impunity to states committing human rights abuses, as states possess fundamental obligations to respect the rights of different peoples within their borders. A state that abuses a people within its borders should lose its legitimacy as a state with respect to that group. The modern era of international human rights law must not permit massive violations of its order under the fig leaf of territorial integrity.[330]

Territorial integrity that is heavily premised on state sovereignty cannot outweigh the protection of human lives. This is in line with what Weller argues to be 'Changing Perceptions of Sovereignty'.[331] He argues that international actors have taken a position that the plights of international populations who face immediate danger need to trump concepts like state sovereignty and non-intervention. Weller concludes by affirming that 'there definitely emerged an environment where the terms of the debate about sovereignty shifted, away from the abstraction of state towards a sense of empowerment and protection of populations'.[332] It is submitted that territorial integrity does not serve as an absolute bar to self-determination. Consequently, due to the integrated relation between secession and self-determination, territorial integrity cannot pose an absolute obstruction to the right to secede.

[330] E Brewer, 'To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion', 45 (245) Vanderbilt Journal of Transnational Law 249-250.
[331] M Weller, *Contested Statehood: Kosovo's Struggle for Independence,* (Oxford University Press 2009) 260.
[332] ibid. Also see, M Doyle, 'The United Nations and National Self-determination: The New Interventionism and an Internationalist Alternative' in W Danspeckgruber and A Watts (eds), *Self-determination and Self-administration: A Sourcebook,* (Lynne Rienner Publishers 1997) 129-147.

However, territorial integrity is not the sole principle that serves to protect the disruption of state borders, recognised by international law. It also recognises the doctrine of uti possidetis. This principle has been applied predominantly to states emerging from colonial rule and other forms of foreign occupation. Below, follows a discussion on whether uti possidetis effectively bars self-determination and the possible effects this may have on the right to secede.

4 4 Uti Possidetis

It is crucial to note that the principles of territorial integrity and uti possidetis are not synonymous. These terms cannot be used interchangeably. Territorial integrity relates to respect for existing boundaries, whereas uti possidetis functions more as a tool for dispute settlement. Johanson describes this distinction in the following manner:

> While territorial integrity relates to illegal force used against already established state territory and prohibits inter-state aggression, uti possidetis is a method of settling claims to territory or boundaries which is based on the consent of the parties for a peaceful solution.[333]

The engagement of international law with the issue of state boundaries cannot be detracted from the debate over self-determination and secession. These latter two concepts have significantly affected the world map and have been historically responsible for the redrawing of international borders. At the start of the nineteenth century in Latin America, the move for colonial territories to become sovereign was accompanied by the retention of the colonial administrative borders as the new states' borders. This practice was followed by the Roman dictum 'uti possidetis jure' meaning 'as you possess in law'. The adoption of the doctrine was 'aimed at averting endless territorial claims and clashes'.[334] The reality has however been the eruption of serious border disputes of which there are still examples today. In the Latin American context, these disputes have taken place between Argentina and Peru,

[333] Johanson, (n 323) 123.
[334] Cassese, *International Law* (n 286) 83.

Ecuador and Peru as well as Brazil, just to mention a few.[335] At present, the ICJ is deliberating on the pending case between Nicaragua and Colombia over a related territorial dispute.[336]

Uti possidetis is premised on consent and agreement. Cassese explains that the doctrine 'took shape in a host of bilateral treaties, as well as the national constitutions of some newly independent Latin American countries'.[337] A relevant question is, whether the principle of uti possidetis makes international borders sacrosanct. Conversely, does uti possidetis limit the rights to secede and self-determination and to what extent?

Although the origin of the principle is most commonly attributed to the decolonisation processes of Latin America, the African context provides some legal clarity on the doctrine. Uti possidetis was accepted as the best course to follow in Africa's decolonisation project. In 1964, at the first session of the 'Conference of African Heads of State and Government' in Cairo, resolution AGH/16(I)[338] was adopted. In this resolution, African heads of states committed themselves to the principle of uti possidetis. The resolution expressly stated 'that the borders of African States, on the day of their independence, constitute a tangible reality'.[339] The *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)*[340] enunciated this resolution as members of the Organisation of African Union pledging:

> [T]hemselves to respect the frontiers existing on their achievement of national independence, inasmuch as, in the preamble to their Special Agreement, they stated that the settlement of the dispute by the Chamber

[335] See generally S Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (McGill-Queen's University Press 2002).
[336] *Territorial and Maritime Dispute (Nicaragua v. Colombia)* [2012] ICJ <www.icj-cij.org/docket/index.php?=p1=3&p2=1&code=&case=124&k=e2> accessed 15 October 2012.
[337] Cassese, *International Law* (n 286) 83.
[338] Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of States and Government held in Cairo, UAR, from 17 to 21 July 1964 (1964) AHG/res.16(I). www.au.int/en/sites/default/files/ASSEMBLY_EN_17_21_JULY_1964_ASSEMBLY_HEADS_STATE_GOVERNMENT_FIRST_ORDINARY_SESSION.pdf accessed 05 October 2012.
[339] ibid.
[340] *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep.

> must be based in particular on respect for the principle of the intangibility of frontiers inherited from colonization.[341]

In the *Case Concerning the Frontier Dispute* the court remarked that 'The principle of uti possidetis freezes the territorial title'[342] from the time of independence. This is to create what the court called the 'colonial heritage'.[343] Consequently, it becomes difficult to apply peoples' will to rule themselves on a determined territory, because uti possidetis is inflexible towards altering territorial titles.

In the Yugoslavian context, the Banditer Commission used the principle of uti possidetis to confirm the retention of the borders of the former Yugoslavian republics after the collapse of the Federation.[344] Opinion 2 stated that 'The right to self-determination is not well-defined under international law; as it stands, the right cannot affect the location of boundaries (uti possidetis juris)'. Further, in Opinion 3 the Commission presented the governing principles for the dissolution of the SFRY as being:

> According to the principles of (1) respect for the territorial status quo and (2) uti possidetis, the former internal boundaries become external boundaries, protected under international law, unless otherwise agreed; also, art. 5 of the SFRY Constitution provides that the republics' boundaries cannot be changed without their consent.[345]

This was in particular in relation to Bosnia-Herzegovina and Croatia. The principle of uti possidetis was given a regional character and was extended to have internal territorial application. Cassese remarks that, the Banditer Commission 'relating to Croatia and Bosnia Herzegovina, applied the doctrine as having a universal and not

[341] ibid para 19.
[342] ibid para 30.
[343] ibid.
[344] Banditer Commission (n 199) Opinion No, 2 & 3; 1497-1500, 31 I.L.M. 1488 1992.
[345] ibid.

only a regional purport'.[346] Consequently, the doctrine possesses a fluidity that stems from its character based on consent and agreement. The commission approached the right to self-determination as an unclear concept. Consent as a constitutional requirement for the alteration of the SFRY borders was then utilised to indicate common purpose to introduce the doctrine of uti possidetis.

The principle of self-determination initially seems to contradict the general purpose of uti possidetis. Self-determination is a composite of the rights to internal and external self-determination. The judgment of the Canadian Supreme Court in the *Quebec case* ruled that the right to external self-determination is only activated once there is a denial of internal self-determination.[347] Wallace reflects this position in her summary on the Quebec case by concluding that:

> It was also noted that no right of external self-determination would be recognised when full participation in civil and political life is available, namely internal self-determination, which may be interpreted as the right of a minority to pursue political, economic, social, and cultural development, within the framework of an existing State.[348]

If this reasoning on self-determination is followed then uti possidetis is reconcilable with internal self-determination. This is because internal self-determination does not relate to the disruption of state boundaries. However, external self-determination would contradict uti possidetis. Ratner reminds us that 'When a new state is formed, its territory ought not to be irretrievably predetermined but should form an element of the goal of maximal internal self-determination'.[349] In contrast to this Johanson argues that uti possidetis does not constitute a rule or principle of international law and as such, 'it cannot legally be understood to limit the principle of self-determination or reduce its effect to nothing'.[350] Even the ICJ, in the *Case*

[346] Cassese, *International Law* (n 286) 84.
[347] *Quebec case* (n 25) 112.
[348] Wallace and Martin-Ortega (n 231) 72.
[349] S Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States', The (1996) 90(4) American Journal of International Law 612.
[350] Johanson, (n 323)123.

Concerning the Frontier Dispute, felt that it was not necessary to 'show that this is a firmly established principle of international law where decolonisation is concerned'.[351] The ICJ re-affirmed that the uti possidetis' application on the African continent should not been seen as the emergence of a practice establishing a rule under customary international law.[352] The court found that the adoption of the principle to respect colonial administrative boundaries as the new state boundaries was latent in many African declarations. This affirms the character of uti possidetis as a legal phenomenon based on consent and agreement.

The right to secede stands in stark contrast to uti possidetis. Uti possidetis is directed towards the retention of the territorial status quo and maintenance of peace and security. The right to secede could consequently be perceived as a threat to the purpose of uti possidetis. Ratner however argues that, 'uti possidetis is agnostic on whether or not secessions or breakups should occur and is not simply the legal embodiment of a policy condemning them'.[353] It appears that the doctrine would still have consequences for the enjoyment of a right to secede.

Ratner further argues, that 'By hiding behind inflated notions of uti possidetis, state leaders avoid engaging the issue of territorial adjustments – even minor ones – which is central to the process of self-determination'.[354] The doctrine of uti possidetis primarily contemplates the retention of colonial borders after emancipation from colonial rule, but does not factor in the on the ground realities of a territory. Ironically, the right to self-determination has the decolonisation process to thank for its development into an erga omnes norm of international law. The application of the doctrine can be said to be limited to the decolonisation period. It is in the application of the doctrine to the dissolution of Yugoslavia where problems is encountered. Firstly, the borders that were in dispute were internal federal boundaries. Secondly, the application of uti possidetis, alone, cannot be said to create international legal personality. The application of the doctrine to internal federal borders was based on

[351] *Case Concerning the Frontier Dispute* (n 340) para 20.
[352] ibid para 21.
[353] Ratner (n 347) 601.
[354] ibid 591.

a presumption that these federal states would become independent. The reasoning behind this presumption lies in the fact that the Yugoslavian federation broke down before it dissolved. Slovenia and Croatia declaring their independence at the time, serves as evidence of this.

Further, uti possidetis is based on the maintenance of the status quo, and the creation of new states is beyond its operation. Buchanan persuasively remarks that 'There is nothing in international legal doctrine or practice, and certainly nothing in the concept of a federation, that imputes a presumptive right to independence to federal units'.[355] This said the doctrine remains based on consent and agreement. Although its application to Yugoslavia seems novel, consent and agreement still governed its adoption. In the *Case Concerning the Frontier Dispute,* the ICJ alluded to the inherent contradictions between uti possidetis and other international norms – such as self-determination. The court remarked:

> Thus the principle of *uti possidetis* has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms implied.

The ICJ stressed that the operation of the doctrine in Africa was a 'deliberate choice'.[356] Further, the court suggested that uti possidetis 'has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples'.[357] This highlights the character of the doctrine of consent and agreement.

Consequently, international law needs to adopt an interpretation of self-determination that is cognisant of uti possidetis. The doctrine might be argued to be dormant or not to have survived the decolonisation period. However, its relevance to the process of secession and the manifestation of self-determination is clear. The

[355] Buchanan, 'The Quebec Secession Issue' (n 237) 252.
[356] *Case Concerning the Frontier Dispute* (n 340) para 26.
[357] ibid para 25.

contradictions between uti possidetis, self-determination, and secession are noticeable. The solution to these contradictions is twofold. The first is present within the character of consent and agreement. If the doctrine finds application via consent and agreement, then its results can also be altered through the same process. However, within the contexts of a secessionist movement, the contracting parties would most likely not be the secessionist. The second is the approach suggested by the ICJ in the *Case Concerning the Frontier Dispute*. In the interpretation of the rights to self-determination and secession, the doctrine needs to be considered. Just as the right to secede has been adopted into national constitutions so has the right to self-determination. Below the nature of self-determination and its potential for a right to secede is investigated from this domestic perspective.

4 5 A Constitutional Right to Self-determination

In the previous chapter, the manifestation of the right to secede was analysed within the context of constitutional dispensations.[358] Similarly, the focus in this section is on the constitutional inclusion of the right to self-determination. As was highlighted above, that the right to secede forms an integrated part of the right to self-determination. Where the right to self-determination has a constitutional presence, the potential of secession cannot be excluded in principle. If the will of peoples is expressed in the form of external self-determination, a legitimate right to secede could potentially be activated. In the preceding chapter, it was equally found that domestic recognition of the right to secede enhanced the normative character of the right. The domestic recognition of the right in turn endows it with legal functionality. The test utilised to identify legal functionality, consisted of a search for the substantive and procedural nature of the right. Although not all of the examples of a constitutional right to secede presented a substantive and/or procedural character, they still contributed in promoting its legal functionality. In support of such an approach, Weller suggests the concept of 'Constitutional Self-determination'.[359]

[358] See Chapter 3.
[359] M Weller, 'Why The Legal Rules Of Self-Determination Do Not Resolve Self-Determination Disputes' In M Weller, B Metzger And N Johnson (eds), *Settling Self-Determination Disputes: Complex Power-Sharing In Theory And Practice* (Martinus Nijhoff Publishers 2008) 31.

Weller contrasts constitutional self-determination with colonial self-determination in his exposition of the concept. He argues that the fundamental differences between these concepts are that with colonial self-determination 'the right to secession is based directly in international law'.[360] Colonial self-determination is premised on the argument that the right to self-determination is limited to the decolonisation project. In addition, colonial self-determination has been argued to be the only form of the right to self-determination. Constitutional inclusion of the right to self-determination provides for a de facto recognition of the right outside the decolonisation process. However, the application of the right would be limited to the domestic jurisdiction. With constitutional self-determination, 'the claim for self-determination is derived from a constitutional arrangement that establishes a separate legal personality for component parts of the overall state'.[361]

Constitutional recognition of the right to self-determination is not foreign. The South African constitution[362] for example, in section 235 expressly gives recognition to the peoples' right of self-determination.[363] Although the South African Constitutional Court limited the interpretation of self-determination to the formation of organs of civil society,[364] the right is still subjected to the constitution's international law rule, present under section 233. Read together with this provision is section 39 (1) (b) which places the courts under an obligation to consider international law when interpreting the constitution. This position was confirmed in *Government of the Republic of South Africa v Grootboom* (hereinafter the *Grootboom case*)[365] which confirmed the approach towards international law that was established in *S v Makwanyane* (hereinafter the *Makwanyane case*).[366] In the *Makwanyane case* the court concluded that the provision which was to become section 39 (1) (b) found

[360] ibid.
[361] ibid.
[362] Constitution of The Republic Of South Africa, Act 108 Of 2006.
[363] The provision states that 'The right of the South African people as a whole to self-determination, as manifested in this constitution, does not preclude, within the framework of this right, recognition of the notion of the right to self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the republic or in any other way, determined by national legislation'.
[364] *In Re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), para 24.
[365] *Government of the Republic of South Africa v Grootboom* 2001(1) SA 46 (CC). Further see; *Jafta v Schoeman and Others; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).
[366] *S v Makwanyane* 1995 (3) SA 391 (CC).

international law to include binding and non-binding international law.[367] In the *Grootboom case*, the court confirmed the principle laid down in the *Makwanyane case*, but a proviso was attached. The honourable Constitutional Court Judge Yacoob stated although international law is a tool of interpretation the weight to be attached to each principle of international law will vary.[368],

Section 233 of the South African constitution places a legal duty on the courts to interpret any legislation including the constitution to be consistent with international law. In *Kaunda v President of the Republic of South Africa*[369] judgment, the South African Constitutional Court concluded that all legislation, including the constitution together with its bill of rights needs to be interpreted in accordance with section 233. The court's deliberate move to exclude the employment of the right for secessionist aspiration is reflected where it states that:

> The concept 'self-determination' is circumscribed both by what is stated to be the object of self-determination, namely, 'forming, joining and maintaining organs of civil society' as well as by Constitutional Principle I which requires the state for which the Constitution has to provide, to be 'one sovereign state'. In this context 'self-determination' does not embody any notion of political independence or separateness.[370]

In the South African context some conflicting ideas exists with regard to the right to self-determination. The South African Constitutional Court limited the interpretation of the right to exclude the potential of secession. International law does not expressly prohibit secession as an outcome of the expression of the right to external self-determination. On the contrary, it could be argued that international law recognises the right to external self-determination and potentially the right to secede. The South African constitution places a constitutional duty on the courts to follow a reasonable interpretation of any legislation, which in this case would be the constitution self, 'that

[367] ibid, para 35.
[368] *Grootboom case* (n 363) para 26.
[369] *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 33.
[370] ibid.

is consistent with international law over any alternative interpretation that is inconsistent with international law' under section 233 of the South African Constitution. Important distinctions are however present within the South African constitutional dispensation. In *Glenister v President of the Republic of South Africa*, the Constitutional Court elaborated on these distinctions eloquently in that firstly, section 233 is only limited to the interpretation of legislation; secondly, that section 39(1)(b) places an obligation on South African courts to consider international law strictly in the interpretation of the Bill of Right only and thirdly that section 37(4)(b)(i) requires that legislation which is inconsistent with the Bill of Rights be consistent with South Africa's international obligations during states of emergency.[371] The right to self-determination, as such, has not been tested by the South African courts yet. A further exploration of examples of constitutional rights to self-determination will serve to inform the concept.

Weller suggests the existence of three different types of constitutional self-determination. These are 'express self-determination status'; 'effective dissolution of a federal-type state' and 'implied self-determination status'.[372] Under express self-determination status, the right to self-determination or secession is a specifically mentioned right within the constitution. The South African example, discussed above, serves as an example of this. Weller states that 'Ordinarily, constitutional self-determination will assign a right of secession only to federal-type territorial units (…) that are clearly defined in terms of territory'.[373] Thus, the possibility that the constitutional right to self-determination could give rise to a right to secede would only exist within a federal system. Examples of this form of constitutional self-determination are present in the constitutions of the former USSR, SFRY and Ethiopia as discussed in chapter 3.[374]

[371] Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) para 97.
[372] Weller (n 357) 32.
[373] ibid 33.
[374] These constitutional phenomena was comprehensively discussed in Chapter 3.

Interestingly Weller also proposes a sub-category of express self-determination or 'conditional self-determination'.[375] Under conditional self-determination, an express provision of a constitution provides for self-determination under specific conditions. An example of such a provision is the constitutional conditions for the potential division of the Republic of Moldova. The relevant provision is accommodated in the 'The Law on the Special Legal Status of Gagauzia'; in article 1(1) it is stated that:

> In case of a change of status of the Republic of Moldova as an independent state, the people of Gagauzia shall have the right to external self-determination.[376]

Weller argues that the 'The change that is being contemplated is a possible division of Moldova, with its larger segment potentially joining Romania'.[377] The activation of the right to secede is delayed pending the fulfilment of the constitutional condition. However, in reality the Moldovan government does not have a positive record of accomplishment in supporting external self-determination, as the above provisions would indicate.[378] Conditional self-determination seems to be a more preferred manner for the right to secede to find constitutional application. Secession becomes a direct possibility where the condition is fulfilled.

The second type of constitutional self-determination proposed is effective dissolution of a federal-type state. The former SFRY and USSR also serves as examples in this regard. It is vital to distinguish between a single state within the federation employing the right to secede (express self-determination) and all the member states using it because of the dissolution of the federation. The relevant issue is whether the

[375] Weller (n 357) 32.
[376] The Law on the Special Legal Status of Gagauzia, 23 December 1994, <http://www.intstudies.cam.ac.uk/centre/cps/documents_moldova_law.html> accessed 10 October 2012.
[377] Weller (n 357)32.
[378] The treatment from both Moldova and Russia towards separatists in Transdniestria bears evidence to this. In 1990 via a declaration of independence, separatists in Transdniestria established the 'Moldavian Republic of Transdniestria'. The Moldovan government declared the presidential elections of 1991 illegal and military forces where moved against the territory of Transdniestria. See further, *Ilascu and Others v. Moldova and Russia* (General Council) No. 48787/99 ECHR 2004-VII 28-183; and *Catan and Others v. The Republic of Moldova and Russia* (General Council) No. 43370/04 ECHR.

inclusion of a right to self-determination in the federal constitution gave rise to a right to secede automatically upon dissolution of the federation. If the constituting states were the holders of original sovereignty, then a strong argument could be made that secession was not at play.

In order to imply self-determination, according to Weller requires three aspects, firstly, a distinct people or nation; secondly, constitutional muteness on the right to self-determination and a thirdly, a defined constitutional territory. The issue of secession under the banner of self-determination would then be subjected to government consent or cooperation as well as a process of referendum. Weller explains that:

> Where the central government consents to the holding of a referendum on the issue of secession, or where such provision exists according to the constitution in the absence of an express reference to self-determination, there is an expectation that such a referendum would need to be respected by the central authorities.[379]

According to Weller,[380] Quebec serves as an example of this. Quebec has distinct peoples, the territory enjoys constitutional recognition as part of the federal state, and the Canadian constitution is mute on the issue of self-determination. The Canadian Supreme Court acknowledged that a referendum would provide for democratic legitimacy as to the will of the people to secede or not.[381] However, the court found a referendum to determine disintegration not to be sufficient and 'superficially persuasive'.[382] The Canadian Supreme Court suggested that something more is required and that the original constitution making process provides this answer. The court presents two possibilities, firstly that the Quebec authorities initiate a constitutional amendment at the federal level to provide for their

[379] Weller (n 357) 39.
[380] Weller also suggests that Scotland would serve as an example for implied self-determination status. However, the UK does not have a drafted down constitution. The concept of implied self-determination as a sub-division of constitutional self-determination cannot find application within the context of Scotland.
[381] *Quebec case* (n 25) 87.
[382] ibid. 75.

secession.[383] The second is that a constitutional obligation to negotiate exists and accordingly this process should rather be followed.[384] The court concluded that:

> Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation.[385]

Weller submits that the process of a referendum would lend international legitimacy to independence if the outcome were independence.[386] In relation to the legitimacy of the referendum, the court concluded that 'At issue is not the legality of the first step but the legality of the final act of purported unilateral secession'.[387] Implied self-determination status seems to be premised on establishing a right to self-determination that is inherent within all constitutions. However, constitutions remain creatures of their authors and not popular will. The suggestion that the outcome of a referendum tacitly incorporates the right to self-determination into a constitution carries little legal weight.

4 6 Concluding Remarks

The continued resistance against an operative right to secede is found to be based on two primary assumptions. Firstly, legal scholars and political commentators alike, assume that the recognition of a complete right to secede under international law would lead to the proliferation of new smaller states. Ratner comments that 'First, I assume that the proliferation of states, each smaller and more ethnically based than that from which it emerged, is not desirable'.[388] The second assumption is that the rights of minorities within the seceding territory would be relentlessly denied. Horowitz follows this reasoning in that 'The more circumscribed the asserted right to secede, ironically enough, the more dangerous conditions may become for minorities

[383] ibid. 87.
[384] ibid. 97.
[385] ibid 151.
[386] Weller (n 357)39.
[387] *Quebec case* (n 25) 86.
[388] Ratner (n 347) 592.

in the secessionist region'.[389] These pre-emptive assumptions make the alliance between the right to secede and self-determination even more imperative. These assumptions amount to mere generalisations and do not reflect a general consequence of the right to secede. The right to self-determination is populated by similar assumptions and generalisations.

The classical perspective on self-determination has been that it leads to the destruction of statehood and fragmentation of nationalist aspiration. However, the development of the principle has transformed these views. The research presented above indicates that the relationship between the right self-determination and a right to secede is inherently integrated. The right to self-determination is a concept that has at its core the will of the people. These expressions inform the right to secede. The right to secede finds exclusive application within a people's will to express external self-determination. However, the variations and interpretations under which the right can be expressed are broad. Secession is but only one option amongst many. However, it can be conclusively concluded that the potential for the right to secede flowing from an expression of a peoples' will to external self-determination is real.

Within the context of the UN Charter, self-determination was entrenched seemingly as a right of states and governments. However, due to the development of the right a better legal understanding of the principle exists today. Self-determination should be interpreted progressively within the context of the UN Charter to include a peoples' right. This is also, what the ICJ did in the *Western Sahara case*[390] and the *South West Africa case*[391] The ICJ did not allude to this expressly; however, the court presumed that the developed version of self-determination should be followed by implication. The right to self-determination, in this regard, provides the practical partnership that could strengthen a right to secede.

[389] D Horowitz, 'A Right to Secede' in Macedo and Buchanan (n 15) 54.
[390] *Western Sahara case* (n 100) para 51.
[391] *South West Africa case* (n 54) para 52.

Further, it is concluded that territorial integrity is not an absolute bar to the exercise of external self-determination. The potential of exercising a right to secede could overcome the obstacle that the respect for territorial integrity poses. The research revealed two findings, which dictate the relationship between self-determination and territorial integrity. Firstly, national unity premised on the ideals of nationalism as the traditional justification for respect for territorial integrity, has failed. It is this justification that can also be held liable for the proliferation of secessionist entrepreneurs. Contrary, territorial integrity remains indispensable to the maintenance of peace and security. Importantly where self-determination reveals itself as a peoples' right, the principle of territorial integrity protects that state's interest. The role of territorial integrity as a custodian of the continuance of the Westphalian order is therefore threatened by the very notion that it aims to promote – nationalism.

Secondly, international law has qualified the enjoyment of territorial integrity. The development of self-determination into an erga omnes norm of international law provides this qualification. For a state to have full control over its territorial integrity, it needs to possess a legitimate government. The legitimacy of the state is premised on its recognition of internal self-determination. This broadly means that the state gives effect to the internal civil, political, cultural and economic rights of peoples. Where a state commits gross human rights violations, the absolute integrity of its territory would be difficult to uphold. This provides a positive argument for the application of a right to remedial secession within this context.

With the discussion above two themes became clear, with the operation of the doctrine of uti possidetis towards self-determination. Firstly, Uti possidetis does not contradict self-determination in general. Internal self-determination is reconcilable with the doctrine. External self-determination presents a challenge however. Secondly, although international law recognises the doctrine of uti possidetis it cannot be said to be a stronger norm of international law than self-determination. The doctrine finds application with consent and agreement. Norms of international law remain operational even where they are not consented. They develop through

statute, treaty and state practice. Self-determination has acquired this status under international law. Uti possidetis only finds application where consent is given. In the *Case Concerning the Frontier Dispute*, the ICJ explained that the adoption of the doctrine in Africa was deliberate. The *Palestinian Wall case* re-affirmed the erga omnes character of the right to self-determination as confirmed in the *East Timor case*.[392] A legitimate argument that uti possidetis can limit the right to self-determination under contemporary international law is contestable.

Under the concept of constitutional self-determination, express self-determination will give effect to this position. Where the right is expressed, it lends itself to legal certainty. The development and operation of the right can also be limited by special conditions or enhanced through a constitutional amendment. The concept of Effective dissolution self-determination indicates that the end of every federation, automatically transform member states into independent sovereign states. The deficiency of this theory lies within its inability to explain the origins of the newly found sovereignty. This creates application problems. The examples of the breakups of the USSR and SFRY showed that the theory could not be consistently applied. The concept of implied self-determination can easily be dismissed because it purports to suggest that inherent in all constitutions is a right to self-determination. The theory omits the fact that constitutions are social contracts and without a guiding constitutional principle to this effect, the theory fails in this context. An inherent constitutional right to self-determination is admirable; however, the operation of self-determination towards secession is best served under international law. Consequently, constitutional inclusion promotes internal self-determination, because the entrenched constitutional rights should inform it. However, external self-determination finds a legitimate position under international law.

The moral justification for self-determination is directly linked to the system of statehood, nationalism and national unity. A clearly defined legal right to secede cannot be declared non-existent, only based on it being inoperative under

[392] *Palestinian Wall case* (n 251) para 88.

international law. An approach that seeks to view secession as a competing right or a subsidiary right to self-determination, is premised on misconceptions. The continued passiveness of international law in dealing with secession has not altogether derailed the issue. Secession attempts are still on going around the world with active separatist movements. The only resort for a secessionist with a clearly defined general theory or positive entitlement to secede is unilateral conduct. The following chapter will seek to answer the question whether the normative character of a right to secede influences unilateralism.

5 Unilateral Secession

5 1 Introduction

The parameters of unilateralism as discussed in this chapter are limited to the context of unilateral secession. The issue of unilateral secession is analysed from the perspective of the Kosovo Opinion. The unilateral nature of the declaration for independence is investigated in light of the above decision. Of particular interest are the court's reasons for avoiding the discussion on the right to secede and secession in general. This missed opportunity, to bring clarity to the existence and scope of the right to secede is critically evaluated. The chapter reviews the court's logic in taking a narrow approach to the interpretation of the legal question posed by the UNGA. Furthermore, the principle of self-determination intrinsically seems to suggest that singular action need to be central to initiating the right. Unilateral conduct thus cannot be excluded.

This chapter completes the discussion on the prescriptive nature of the right to secede. In chapter 3, it was confirmed that secession is a process. In the same chapter, it was presented that the most effective path to secession would be claim, effective control and finally recognition. Through the element of recognition the secessionists seeks external legitimacy for their unilateralism. This also satisfies the final requirement for statehood as express under the Montevideo Convention – the ability to enter into external relations with other states. Whether secession is via mutual consent or unilateral, other states have to be informed of the formation of a new entity. A declaration of independence provides this vehicle. In the context of unilateral secession, the unilateral declaration of independence is the mechanism employed. This final chapter aims at contributing to a general understanding of unilateralism and secession, coupled with a specific inquiry into the unilateral declaration of independence and the right to secede.

The analysis furthermore aims to elucidate the effect and binding force of unilateral acts especially in the context of a right to secede. Cassese suggests that 'Not all unilateral acts give rise to new binding rules providing for specific conduct, not predetermined in its content'.[393] The consequence of this is that there is no principled rule governing unilateralism under international law and an ad hoc approach is followed. This chapter seeks to establish a unified position on the nature and effect of unilateralism and a right to secede. Unilateral acts cannot be ignored for the absence of consent or cooperation. Cassese remarks that 'Indeed, most unilateral acts produce other legal effects'.[394] This chapter exposes two imperative aspects of the unilateral declaration. Firstly, that the unilateral character of the declaration does not prohibit it from having legal effect. Secondly, that even though the declaration is politically charged, because it possesses legal effect it can be tested against international law by a competent judicial body like the ICJ.

As discussed above, it is clear that a right to external self-determination is recognised by international law. Customary international law points to three different circumstances under which international law would condone unilateral conduct in pursuit of external self-determination. The general criteria would be where peoples are denied the possibility of internal self-determination. More specifically, a right to external self-determination would be open to peoples where there has been a persistent onslaught on them by a government, which has denied them their fundamental human rights. The process of disintegration of a part of the territory of the oppressive state would constitute remedial secession. Remedial secession then becomes the consequence of this expression of external self-determination.

5 2 The Kosovo Opinion

5 2 1 Background

[393] Cassese, *International Law* (n 286) 184.
[394] ibid.

Kosovo was recognised under the Yugoslavian Constitution as an autonomous member of the federation between 1974 and 1989. With the death of Tito,[395] Serbian President Slobodan Milosevic ascended to power within the Yugoslavian federation. In the late 1980's Milosevic incorporated Kosovo into the Serbian territory via amendments to the constitution, he effectively and unilaterally stripping the province of all autonomy. Under the SFRY constitution, Kosovo enjoyed full representative authority within the federal parliament similar to the constituent republics. Kosovo also had the capacity within the rotating collective presidency of the federation. Slovenia and Croatia feared the rising power of Serbia within the federation and moved to propose a new constitution, which was fiercely opposed by Serbia. The breakdown in negotiations between these mentioned states, led to Croatia and Slovenia declaring their independence respectively on the 25 and 26 of June 1991. Serbia responded to this by using armed force against the territories of the separatist. The international community responded with passivity and only denounced the conduct of Serbia under the flag of the federal forces. The continued attacks on Kosovo's autonomy eventually led them to declare independence. This move led to an international crisis forcing North Atlantic Treaty Organisation (hereinafter NATO) to intervene in the form of aerial strikes against the territory of Serbia and the Kosovo regions.

In the aftermath of the conflict, Kosovo was placed under temporary UN administration. UN Security Council (hereinafter UNSC) Resolution 1244[396] was the legal authority used to place Kosovo under UN and NATO administration. Resolution 1244 led to the establishment of the United Nations Interim Administration in Kosovo (hereinafter UNMIK). UNMIK then setup a form of government named the Provisional Institutions for the Self-government of Kosovo.

In reflection on the situation in Kosovo, Weller declared that, 'Kosovo made manifest the discovery that states cannot claim rights and privileges that exceed or destroy

[395] Josip Broz Tito, was the benevolent Yugoslavian president, revolutionist and dictator. He died on the 4th of May 1980. It is widely accepted that it was through him that the federation was kept together and that his death brought about the disintegration of the SFRY.
[396] Kosovo (adopted 10 June 1999) SC res. 1244.

those of their constituents, the people'.[397] He makes the point that state power is transferred to the state via the peoples' will and that 'If creating a state is an act of will of its constituents, then leaving the state on the basis of an act of will should also be possible'.[398] This contention is reconcilable with the argument made in chapter 4 that self-determination is inherent within all state formation. Further, that as a starting point the expression of self-determination needs to be based on the peoples' will. This is the reasoning behind the second declaration of independence of Kosovo. On the 17th of February 2008, the unofficial government[399] of Kosovo, unilaterally declared their independence from the Republic of Serbia. The situation in the UNSC was marred by suppressions in dealing with the situation, because of qualifying states exercising their veto rights. This eventually forced the UNGA to seek the opinion of the ICJ. The request for an advisory opinion by the ICJ was formulated under UNGA Resolution 63/3.[400] The question to the ICJ by posed by the UNGA was phrased in the following manner: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'[401]

The Kosovo situation provided the ICJ with an opportunity to develop the right to self-determination beyond the colonial context. The court could also have provided clarity with regard to the uncertainty over the exercise of a remedial right to secede. The people of Kosovo could have been considered an oppressed and marginalised minority within a state. The Serbian state's conduct was a clear denial of the Kosovo peoples' right to internal self-determination and a violation of their human rights. In the absence of the colonial context, the court could have brought clarity on the relationship between a right to secede and self-determination. More specifically, the development of the right to self-determination into an erga omnes norm of international law placed a duty on the court to address the legal status of the people

[397] Weller (n 357) 3.
[398] ibid.
[399] They are named the 'Provisional Institutions for Self-government of Kosovo'. They were also the original authors of the declaration of independence.
[400] Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law (adopted 8 October 2008) GA res. 63/3.
[401] *Kosovo case* (n 4) para 1.

of Kosovo. In the *Barcelona Traction case*,[402] the ICJ stated that obligations erga omnes are in essence 'the concern of all States'.[403] However, the court did not extend this obligation to itself. As discussed above the denial of internal self-determination opens the door for the realisation of the right to external self-determination under certain circumstances. Whether, external self-determination is expressed, as an aspiration for full independence is only one option of the many available under this norm.

5 2 2 Scope of the Advisory Opinion

The Provisional Institutions of Self-government of Kosovo submitted to the court that a narrow interpretation of the legal question was prudent. They argued that moving beyond the question whether the specific declaration breached international law was over-reaching on the part of the ICJ.[404] Serbia and the states in support of the illegality of the declaration, argued for broad interpretation of the legal question. A broad interpretation of the legal question could have included how international law positions itself relative to the right to remedial secession, the legitimacy of unilateral declarations of independence and the related impact on the right to external self-determination.

It can be argued that the court's judgment promotes secession. However, the ICJ expressly addressed the potential of such an interpretation of its reasoning and conclusion. The court held that a debate into the position of secession or even the right to self-determination was beyond the scope of the question posed by the UNGA.[405] The ICJ found that, 'the Court need only determine whether the declaration of independence violated either general international law or the lex specialis, created by UNSC Resolution 1244.[406] The focus, in the court's opinion,

[402] *Barcelona Traction, Light and Power Company, Limited, Second Phase*, ICJ (Judgment) I.C.J. Rep. 1970.
[403] ibid. para. 33.
[404] See *Kosovo case* (n 4) 'Written Contribution by the Republic of Kosovo' Pleadings 131.
[405] *Kosovo case* (n 4) para 83.
[406] *Kosovo case* (n 4)para 83.

should be on whether either general international law or UNSC Resolution 1244 prohibited the unilateral declaration of independence.

The court stated that no evidence could be found that general international law prohibits unilateral declarations of independence.[407] On the contrary, with reference to the ICJ case law on the right to self-determination[408] the court mentions the development of a right to independence existing under international law.[409] In the court's own words, the development of the right to self-determination gave rise to the creation of 'a right to independence for the people of non-self-governing territories and peoples subjected to alien subjugation, domination and exploitation'.[410] The court's interpretation of this right to independence seems to be limited to the colonial regimes. This would have exhausted the right to independence because no colonies exist anymore. Ryngaert agrees with this reasoning, when he argues that:

> According to the Court, there is a positive right to independence within the framework of the right to self-determination in a colonial context. Outside this scenario, international law would remain silent about the legality of unilateral declarations of independence (in the sense that international protest and condemnation did not ensue).[411]

Some commentators has criticised this fundamental point, whether Kosovo can be regarded as a state, in addressing its unilateral conduct. The bases of these arguments are that international law is concerned with state conduct, as states are the primary subject under international law. As a proponent of this view, Ryngeart argues that:

---

[407] ibid para 79.
[408] The right to self-determination has been extensively developed by the jurisprudence of the ICJ. See the following cases: *South West Africa case* (n 54) paras 52-53; *East Timor case* (n 125) para 29; *Palestinian Wall case* (n 251) para 88.
[409] *Kosovo case* (n 4) para 79.
[410] ibid.
[411] C Ryngaert, The ICJ's Advisory Opinion On Kosovo's Declaration of Independence: A Missed Opportunity?: International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, (2010) 57 (3) Netherlands International Law Review 489 .

> Since in a process of secession, entities that are not (yet) constituted as states secede from an existing state (albeit with a view of state formation), such a process does not belong to the sphere of inter-state relations. Consequently, the principle of territorial integrity does not apply, and international law may not prohibit secession.[412]

This reasoning seems to be flawed in that states are not the exclusive subjects of international law. Recent times have seen the proliferation of non-state actor on the international field. The respect for territorial integrity as pronounced within the UN charter and other international legal sources do not seem to suggest that it is exclusively a prohibition relating to inter-state relations. Consequently, the point is moot. In conclusion the scope of the advisory opinion was limited to the narrow legal question, whether the unilateral declaration was in violation of either general international law or UNSC Resolution 1244. However, other legal issues arose out of this position by the court further addressed below.

5 2 3 Legal Issues

From the first instance, the court in the Kosovo Opinion made it clear that the legal question was limited. The court opposed an interpretation of the question that favoured the inclusion on whether international law in general affords Kosovo a right to secede.[413] This stated, the court however did mention that:

> Indeed, it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it.[414]

The court sought to separate the legality of a positive legal entitlement like a right to secede, from the specific act of declaring independence. Conversely, the court pre-

[412] Ryngeart (n 411) 491.
[413] *Kosovo case* (n 4) para 56.
[414] ibid.

emptively aimed at avoiding that the judgement be interpreted as a justification for the existence of a unilateral right to secede. However, the unilateral declaration of independence needs to be motivated by a legal norm that endows it with legal relevance.

In the court's conclusion, two aspects were highlighted, indicating that there is no general rule of international law that is directed at prohibiting a unilateral declaration of independence. Firstly, that there is a lack of uniformed state practice in dealing with past declarations of independence. This does not indicate the development of a rule prohibiting declarations of independence. This would be in accordance with Article 38 of the Statute of the ICJ that recognises state practice as a source of international law. Secondly, from the status of previous denouncements of specific unilateral declarations of independence by the UNSC resolutions no general prohibition can be derived. The reasoning behind this, in the court's opinion was that those resolutions did not condemn the unilateral nature of the declarations, but the conduct that violated other fundamental rules of international law that was linked to the declarations.

The issues of UN membership for states who came about via unilateral secession are an illustration of this. In particular, Bangladesh serves as a good example. Bangladesh was denied membership of the UN up until Pakistan recognised its sovereignty in 1974.[415] The opposition to Bangladesh's membership of the UN, after its assisted secession[416] from Pakistan was mainly because of none compliance with UNGA Resolution 2793.[417] This resolution called for Bangladesh to recall troops stationed at the borders with Pakistan. Efevwerhan makes the point that:

> Although, the UN is guided by the traditional requirements of statehood in admission of new members, many entities have been denied membership

[415] Admission of the People's Republic of Bangladesh to membership in the United Nations (adopted 17 September 1974) GA res. 3203 (XXIX); and New member: Bangladesh (adopted 10 June 1974) SC res 351.
[416] The success of Bangladesh's secession was based on the intervention of India during the armed conflict with Pakistan.
[417] Questions considered by the Security Council at its 1606th, 1607th and 1608th meetings on 4, 5. And 6 December 1971 (adopted 7 December 1971) GA res. 2793 (XXVI)

> due to their mode of creation rather than failure to meet the requirements of statehood.[418]

The judgement is ambiguous in dealing with the real legal issues at play in Kosovo. The court's avoidance in positively reflecting on the issue of unilateral secession led to both sides claiming victory from the judgement. The problem lies in the conclusion that although international law does not expressly prohibit unilateral declarations of independence, it also does not directly accommodate it.

5 3 Unilateralism and Secession

5 3 1 The Unilateral Declaration of Independence

The Canadian politician Stephane Dion[419] wrote an open letter to the Quebec Deputy Premier – Bernard Landry, in August of 1997 entitled 'Chaos and dangers would follow a unilateral declaration'. The objective of the letter was to address three issues relating to Quebec's proposed secession from Canada. These were; majority rule, the question of territory and the consequences of a unilateral declaration of independence. In dealing with the third issue, Dion stated the following:

> I noted the absence of any legal principle, international or otherwise, that would create a right to a unilateral declaration of independence in a democratic country such as Canada.[420]

Dion concluded, 'We believe that the position we are defending before the court is in accordance not only with international law, but also with international practice'.[421] This statement identifies a fundamental misperception underlining the relationship

[418] D Efevwerhan, 'Kosovo's Chances of UN Membership: A Prognosis', (2012) 4 Goettingen Journal of International Law 1, 93-130
[419] S Dion, *'Chaos and dangers would follow a unilateral declaration',* Canadian Speeches July-August. 1997: 16-17. <http://go.galegroup.com/ps/i/do?id=GALE%7CA30458805&v=2.1&u=27uos&it=r&p=AONE&sw=w> accessed 26 October 2012.
[420] ibid.
[421] ibid.

between a unilateral declaration of independence, secession and the right to secede. Dion's supposition is flawed in suggesting that a unilateral declaration of independence needs to be a right or that it is a right. Dion however, is correct in his concluding assertion that no legal authority exists to support the creation of a right to a unilateral declaration of independence. This is true because international law does not recognise a right to a unilateral declaration of independence. Another right must then give rise to the legitimate access to the declaration.

The legitimacy of the declaration of independence cannot depend on an uncertain right to secede. Rather it should be because of the right that the statement carries legitimacy. In the absence of the right or bilateralism, secession can still be effected via unilateralism. In the *Quebec case*, the Canadian Supreme Court conceded to the possibility of unilateral secession being legitimate, however only subject to the denial of internal self-determination and recognition. The court declared that 'It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences'.[422]

Recognition is the final step in the process of secession. The declaration of independence becomes the mechanism, which the secession process employs to provide external expression of independence. Does the unilateral nature of the declaration then deprive it of legal consequence? The court, in the Kosovo case opinion expressly denounced the fact that it would be a right to secede that would the source of the unilateral secession. The court was cognisant of the point made in the beginning that a right must give rise to the declaration and not the other way round. In the wording of the court:

> [T]his does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right.[423]

[422] *Quebec case* (n 25) 144.
[423] ibid.

In effect, with this statement the court identified the unilateral declaration of independence as the mechanism, which proclaims the process of secession. The Canadian Supreme Court prioritised recognition as a requirement in order for legal consequences to follow. The court however does not substantiate its position as to why independence cannot be achieved via a right to secede. One can follow an objective reading of the courts ultimate reasoning and conclude that it was based on constitutional incompatibility. In proposing a constitutional amendment or negotiation[424] as the constitutional path for dealing with the secession issue, the court in effect excluded unilateralism. The unilateral declaration of independence would then have no domestic effect. Rather it could be argued, on a domestic level, that the issue is political and consequently a political negotiated settlement should be sought. Ironically, it can be concluded that it would be the legal right to secede that would give the domestic court jurisdiction over the matter.

If the conclusion of the Canadian Supreme Court is followed, if not under a right then under which legal norm does secession manifest? The declaration is a legal expression to the external world and cannot be void of a legal consequence. A legally barren declaration would be akin to the Tennessee declaration of independence of 1861, described by Brandon as:

> It was a simple statement, as if for consumption from the inside. It contained no argument. It opened with a terse statement of the sources of its authority ('we the people of the State of Tennessee'); it 'abrogated and annulled' all prior 'laws and ordinances by which the State of Tennessee became a member of the Federal Union of the United States of America'; and it resumed all the rights, functions, and powers which (…) were conveyed to the Government of the United States.[425]

[424] See sub-chapter 3 4 (The Quebec Proposition).
[425] M Brandon, 'Secession, Constitutionalism and American Experience' in Macedo and Buchanan (n 15) 300.

This statement speaks to two essential elements that are critical to the character of a unilateral declaration of independence. The first can be called the element of externality. The second, that legal norms need to be the underlining force legitimising the unilateral declaration. The element of externality relates to the statement being directed to the outside world. This reflects Brandon's criticism of the declaration to be understated 'as if for consumption from the inside'. In the Kosovo Opinion, the court also reflected on this element of externality. The court observed that:

> The declaration was written down on two sheets of papyrus and read out, voted upon and then signed by all representatives present. It was not transmitted to the Special Representative of the Secretary-General and was not published in the Official Gazette of the Provisional Institutions of Self-Government of Kosovo.[426]

This is a clear indication that the court applied its mind to this element of externality. The primary rationale behind this element is the determination of whether the party making the statement wants to be legally bound by the statement. A legally binding statement to the outside world needs to be distinguished from a mere statement of opinion or symbolic gestures. Clause 12 of the translated Kosovo unilateral declaration, as present in the Kosovo Opinion reads, 'We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration'.[427] The same clause confirms the assertion to be bound and it is linked to the element of externality in the following words, 'We declare publicly that all states are entitled to rely upon this declaration'.[428] The court's inquiry into the identity of the authors of the declaration in the Kosovo Opinion, again serves as evidence to its observation of the element of externality. The unilateral nature of the declaration begs the question who wants to be bound. Consequently, an external, legally binding expression needs to be linked to the authority of the people making it.

[426] *Kosovo case* (n 4) para 76.
[427] Ibid para 75.
[428] ibid.

How does international law distinguish between a declaratory statement and a mere utterance? The relevance of this question lies in whether a state should be bound by a mere statement or not. This is important because a unilateral declaration seeks external legal consequences. Koskenniemi present this point in the following manner:

> Consequently, something else is needed than the establishment of what the State has willed to regard its statement as a binding unilateral declaration. What this 'else' is has been formulated in different ways. Common to these is the attempt to interpret a statement as a unilateral declaration only if it has been made publicly and/or so that other States have either relied or acted upon it or at least had the possibility of so doing. All this works to add an objective element in the interpretation of unilateral statements.[429]

What can concluded from Koskenniemi's statement is that objectivity in interpretation needs to be the result of such a unilateral statement for it to be binding. A test based on Koskenniemi's reasoning for such objectivity would ask two questions. Firstly, was the unilateral statement made publicly and secondly did other states have the possibility to rely or act on it? The requirement that the statement be made publicly is again proof of the element of externality that follows the declaration. The possibility of reliance of other states on the declaration contributes to the decision on recognition. Moreover, it is recognition that the declaration aims at, to conclude the secession process. Recognition adds to the new entity's character in attaining statehood. It satisfies the requirement of the ability to enter into relations with other states. The 'something else' that Koskenniemi refers to could be an underlining legal norm, but objectivity remains central to the character of the unilateral declaration. The subjected will of the declaring party, however needs to inform the objective interpretation of the party relying on the statement.

[429] M Koskenniemi, *From Apology to Utopia: The structure of international legal argument* (Reissue with a new Epilogue, Cambridge University Press 2005) 348.

Above two elements, essential to the character of a unilateral declaration of independence were proposed. These are the elements of externality and the existence of an underlining legal norm. In reference to the second element, the use of the concept a legal norm is deliberate. It is not assumed that a right to secede is the only basis for effecting a legitimate declaration of independence. Outside a recognised right to secede, a unilateral declaration could still possess legal consequences. The South-Sudan unilateral declaration of independence was accompanied by six protocols dealing with various political and transitional issues. Although the protocols were based on prior agreements, they did not amount to an agreement to secede. The South-Sudan declaration of independence remained unilateral and the adoption of the protocols by the Republic of Sudan did not remove the unilateral nature of the declaration. Consequently, the unilateral declaration found its legitimacy in the Comprehensive Peace Agreement[430] and ultimately a referendum that led to independence. In the *Quebec case*, the court also recognised this possibility of an effective unilateral declaration of independence outside of a right to secede. [431] The court stated:

> Although under the Constitution there is no right to pursue secession unilaterally, (…) this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession.[432]

The initial observation should be that the court recognised that the unilateral declaration would be the mechanism bringing about the de facto secession. The Canadian Supreme court went further to conclude that 'The ultimate success of a secession attempt would be dependent on effective control of a territory and

[430] The Sudan Comprehensive Peace Agreement consisted of six protocols. The Protocol of Machakos, signed on 20 July 2002 in Machakos, Kenya; under which the representatives agreed on a broad framework for the principles of governance, the transitional process and the structures of government as well as on the right to self-determination for the people of South Sudan; and on the state and religion. The other protocols where; the Protocol on Security Arrangements, signed in Naivasha, Kenya, on 25 September 2003; the Protocol on Wealth-sharing, signed in Naivasha, Kenya on 7 January 2004; The Protocol on Power-sharing, Signed in Naivasha, Kenya on 26 May 2004; the Protocol on the Resolution of Conflict in Southern Kordofan / Nuba Mountains and the Blue Nile States, signed in Naivasha, Kenya on 26 May 2004 and the Protocol on the Resolution of Conflict in Abyie, signed in Naivasha, Kenya on 26 May 2004. <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf> accessed 15 October 2012.
[431] *Quebec case* (n 25) 106.
[432] ibid.

recognition by the international community'.[433] These factors cannot serve to be the sole basis for legitimacy of the unilateral declaration of independence. However, they are reconcilable with the findings of the research so far in relation to the process of secession. The unilateral declaration seeks to make a statement of internal will and attach to it external expression in order for legal consequences to follow. A claim to secede would be naturally incorporated in such a unilateral statement. Effective control and recognition can only be contributory to the success of secession and only to the extent of establishing statehood, not the legitimacy of the declaration itself.

Brownlie states that 'In the enumeration contained in the Montevideo Convention, the concept of independence is represented by the requirement of capacity to enter into relations with other states'.[434] This capacity needs to be free from outside interference. Dugard argues that, 'If an entity is subjected to the authority of another state in the handling of its foreign affairs, it fails to meet this requirement and cannot be described as an independent state'.[435] An example of such defective independence would be the Bantustans of apartheid South Africa. The international community collectively rejected the independence of these states that did not have the capacity to enter into relations with other states.[436] This does not mean that interdependence between states always nullifies attempts for recognition. In comparison Liechtenstein, willingly transferred some of its independent capacity to Switzerland.[437] In this situation the international community still accorded recognition to Liechtenstein due to the transparency of the relationship,. Even though it could be argued that, the unilateral character of the declaration burdens the potential of recognition. Contrary, an argument could hold that the unilateral nature of the declaration enhances the legitimacy of the new entity that seeks recognition.

[433] ibid.
[434] Brownlie (n 260) 71.
[435] Dugard, *International Law* (n 49) 84.
[436] The apartheid South African government recognised four 'independent' Bantustans. They were Ciskei, Bophuthatswana, Venda and Transkei. The UN General Assembly dismissed the proposed independence of the Transkei as invalid. See The so-called independent Transkei and other Bantustans (adopted 26 October 1976) GA res. 31/6A.
[437] Wallace (n 171) 68. See also *Nationality Decrees in Tunis and Morocco*, P.C.I.J. Rep., ser.B, No.4 (1923) and *Rights of Nationals of the United States in Morocco*, I.C.J. Rep, 1952, 176.

How would the right to secede then find an application in the context of the unilateral declaration of independence? The right to secede is the positive legal entitlement that serves to justify the initiation of the process of unilateral secession. The unilateral declaration then becomes the mechanism via which use of the right is brought to the attention of the international community. The right would satisfy the second element of the proposition brought forward above – the underlining legal norm. The unilateral declaration of independence is consequently a form of external expression of the right to secede. The legitimacy of the right to secede cannot be detached from the legitimacy of the declaration; rather the right serves to enforce the declarations legal justification. An inquiry into the legality of the declaration consequently cannot be void from an inquiry into the right (legal norm). This general trend of criticism followed ICJ's judgment in the Kosovo Opinion.[438] Howse and Teitel reflect this view in their commentary on the dissenting judgement in the Kosovo Opinion by stating that:

> According to Simma, what the Court was really being challenged to do was to determine not simply whether such a declaration was prohibited or not under international law but rather the relevant international legal norms that should guide the conduct of the various actors in the wake of such a declaration. Simma's approach is broadly consonant with the spirit of the Canadian Court's decision: the concern that the process flowing from an expression of the will to secede by a particular group be guided by legal normativity.[439]

This substantiates the earlier assertion that the second element of the declaration should be the presence of underlining legitimising legal norm. The right to secede seeks to be such a relevant international legal norm. The declaration of independence as an expression of the will to secede consequently needs to be

[438] E Christie, 'Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, ICJ Advisory Opinion of 22 July 2010, General List No. 141', Australian International Law Journal, Case note 212; J Ablan, 'Signal and Affirm: How the United Nations Should Articulate the Right to Remedial Secession', 45 Vanderbilt Journal of Transnational Law 214.
[439] R Howse and R Teitel, 'Humanity Bounded and Unbounded: The Problem of State Borders and the Normative Regulation of Self-Determination and Secession in International Law', 18. http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__academics__colloquia__legal_political_and_social_philosophy/documents/documents/ecm_pro_070132.pdf (working paper)

informed by the normative character of the right to secede. A recognised right to secede would then legally guide the execution of the aspiration for independence. The right to self-determination would then naturally also have the potential to be an appropriate norm. The right to internal self-determination will not be applicable to the declaration, because it contradicts the purpose of the declaration. The purpose of the declaration is expressing the will to be politically independent. The form, external self-determination, will however be applicable. Unilateral secession could then potential utilise a unilateral declaration based on the right to external self-determination. It is unclear whether international law requires the norm to be included within the unilateral declaration. It is however accepted that a peoples' will include their legal justification for unilateral secession within the wording of their declaration.

In pursuing an understanding of the utility of the unilateral declaration of independence, it can be concluded that international law in general does not expressly prohibit or authorise a unilateral declaration. This was the conclusion of the ICJ also in the Kosovo Opinion.[440] The court found that even in circumstances where declarations were declared unlawful by the UNSC, it was not because of their unilateral nature. Rather, the ICJ found the illegality of the declarations to stem:

> [F]rom the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character.[441]

One of the primary reasons for the non-recognition of a right to secede under international law resides in the potential of the right being exercised. Resorting to unilateralism consequently becomes inevitable. The potential for unilateralism is enhanced by the fact, that international law attaches legal consequences to such conduct. If a unilateral act such as a unilateral declaration of independence carries

[440] *Kosovo case* (n 4) para 84.
[441] ibid para 81.

legal consequences for other states, how does international law set the boundaries of those consequences?

The unilateral nature of the declaration of independence does not prohibit the flow of legal consequences from such an expression. Consequently, the unilateral aspect of the declaration must not be equated with its legality. The ICJ stated in the *Nuclear Test Case (Australia v France)*[442] that 'It is well recognised that declarations made by way of unilateral acts concerning legal or factual situations, may have the effect of creating legal obligations'.[443] This supports a proposition that where the declaration is pronounced on the bases of a perceived right to secede, legal consequences can still follow the act. Brownlie also makes this point by stating that 'Acts and conduct of governments may not be directed towards the formation of agreements and yet are capable of creating effects in a great many ways'.[444] In effect, all unilateral conduct potentially has legal impact. The unilateral nature of the act does not automatically nullify its legal legitimacy or the extent of its binding force on parties. Brownlie is more specific on this matter, suggesting that 'The formation of customary rules and the law of recognition are two of the more prominent categories with the 'unilateral' acts of states'.[445] A conclusion that provides evidence of that unilateral secession is not without legal effect.

How then does unilateral conduct within municipal jurisdiction find international law application? In the case of unilateral secession, a unilateral declaration needs to be affirmed over the territory where effective control is being exercised. This places the conduct within the domestic legal domain of the state that is losing territory. How can international law find applications over such a claim; the seceding territory is also not a recognised state yet? A similar question was argued before the ICJ in the Kosovo Opinion. The parties submitted that the unilateral declaration is without legal effect, but rather that there exists a domestic political issue. The court found that it did not have to engage constitutional law, because it would be beyond the scope of the legal

[442] *Nuclear Test Case (Australia v France),* ICJ Reports 1974.
[443] ibid. para 43.
[444] Brownlie (n 260) 640.
[445] ibid.

question before it. This contention would also fall beyond the course applicable sources. The court concluded that:

> In the present case, however, the Court has not been asked to give an opinion on whether the declaration of independence is in accordance with any rule of domestic law but only whether it is in accordance with international law.[446]

The court judiciously found its way back to dealing with the unilateral declaration question, by arguing that it could apply international law to the issue without engaging domestic law. Specifically arguing that, 'The Court can respond to that question by reference to international law without the need to enquire into any system of domestic law'.[447] However, the unilateral conduct cannot so easily be severed from the domestic effect it will have. The court assumed that the domestic impact would be political in nature and did not regard this as a bar to tackle the legal question by applying international law. In fact, the court found it imperative that the political nature of the conduct should not impede its jurisdiction, where a clear legal question is present. The ICJ has previously pronounced on its approach to dealing with matters that have a political element to them. In the Advisory Opinion, Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal,[448] the court declared that its capacity was prescribed by statute and not states. In the court's own words, 'The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute'.[449] In the Kosovo Opinion, the court ruled that:

> Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially

[446] *Kosovo case*(n 4) para 26.
[447] ibid.
[448] *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 166 para 14.
[449] ibid.

> judicial task, namely, in the present case, an assessment of an act by reference to international law.[450]

Consequently, the boundaries which international law sets for the legal consequences that flow from a unilateral declaration are captured in the legal nature of the consequences themselves. This allows international law to have powers of adjudication over those legal consequences.

Finally, two conclusions can be drawn from the perspective of international law on unilateral declarations of independence. Firstly, these are statements intended for external legal impact and from which binding legal consequences should flow. Secondly, these statements need to possess an element of externality and be based on an underlining legal norm. This norm can be based on a legal agreement or a positive legal entitlement. It is clear that a unilateral declaration of independence finds legal application under international law. It cannot be conclusively deduced that the right to secede will achieve legitimacy on the grounds of the legality of the unilateral declaration of independence. However, it does allow the right to have to be considered, where secessionist rely on it as the entitlement, giving rise to the declaration. Below this question is analysed from the perspective of the potential of a right to independence.

5 3 2 A Right to Independence

The declaration of independence as a legal phenomenon needs to be based on a legal norm. The declaration could be linked to the right to self-determination; however each instance needs to be evaluated separately. The more natural conclusion would be that the declaration is based on the right to independence. This consequently warrants an inquiry. The brief inquiry into a possible right to independence has two logical aspirations. The first is into the existence of such the right self. The second is, where it is found that the right has legal relevance naturally

[450] *Kosovo case* (n 4) para 27.

it would serve as a potential legal norm to justify a unilateral declaration of independence.

In the statement above by Dion, it was expressed that international law does not recognise a right to a unilateral declaration of independence.[451] This contention was dismissed as being legally incorrect. Independence in this context relates to political independence. Political independence is normally a right that is for the benefit of states. An example contained is principle 1 of the Declaration on Friendly Relations[452] which states that 'Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State'. The norm that needs to underline the unilateral declaration will have to be a norm that attaches to peoples and not states. The entity would not have attained statehood to claim state political independence. The correct question would be, does international law acknowledge a right to independence as a collective right of peoples. In the Kosovo Opinion, the court made the statement that:

> During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.[453]

The declaration by the court was made in the context of the decolonisation process. According to the court, the principle of self-determination was responsible for the creation of this right. The court highlighted state practice in recognising these new states. It concluded that 'A great many new States have come into existence as a result of the exercise of this right'.[454] It seems that the court sought to suggest that the right to independence was derived from the right to self-determination. Alternatively, that it developed from a people's right to self-determination. However, the court is not clear as to whether the right could operate independently from the

[451] Dion (n 419) supra.
[452] Declarations on Friendly Relations (52) supra.
[453] *Kosovo case* (n 4) para 79.
[454] ibid.

right to self-determination. Further, it is also uncertain whether the right survived the decolonisation process.

Where it can be argued that the right to independence possesses independent operational force, it would comfortably serve as an underlining legal norm for a unilateral declaration. A broad interpretation of the Declaration on Friendly Relations suggest the existence of a right to independence. The declarations states that:

> Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.[455]

The declaration is not clear on whether a direct right to independence is available under international law. What seems more probable is the presence of a derived right. A cursive reading of Declaration 2526 (XXV) would suggest that even if the right did exist independently, it would still operate under the principle self-determination. The above-cited references to the right, is always in context with the right to self-determination. Through the operation of the right to self-determination, the right to independence then finds application. No authority exists for its independent operation under international law. However, the recognition of a right to independence would contribute significantly to the recognition of a right to secede under international law.

5 3 3 Remedial Secession

The process of seceding in order to correct an injustice perpetrated against peoples by definition demands unilateral conduct. The process of unilateral secession finds particular application under such circumstances. Practically as well as realistically, the cooperation of the oppressive state cannot be expected to induce secession.

[455] Declarations on Friendly Relations (52) supra.

This especially relevant when there is a denial of internal self-determination and oppression. The rationale is that the serious violation of rights serves to justify the unilateral conduct. This position can be equated with the ICJ's conclusion in the *South West Africa case* on the paradox that is present where a legitimate authority abuses a power stemming from a mandated. The court stated that:

> It has been suggested that, even if the Council of the League had possessed the power of revocatiori of the Mandate in an extreme case, it could not have been exercised unilaterally but only in Co-operation with the mandatory Power. However, revocation could only result from a situation in which the Mandatory had committed a serious breach of the obligations it had undertaken.[456]

The court acknowledges that no unilateral power to revoke the mandate could be executed by the Council of the League of Nations. Consequently, the revocation needed to happen together with the mandated state. One part of the paradox lies in the fact that the only ground for revocation would be consent of the offending state after a serious breach of the obligations under its mandate. South Africa committed this breach through, amongst other things, the implementation of its apartheid policy in Namibia. The other part of the paradox is that the consent and co-operation of the offending party is required in order to right the wrong via revocation of the mandate. The court concluded that:

> To contend, on the basis of the principle of unanimity which applied in the League of Nations, that in this case revocation could only take place with the concurrence of the Mandatory, would not only run contrary to the general principle of law governing termination on account of breach, but also postulate an impossibility. For obvious reasons, the consent of the wrongdoer to such a form of termination cannot be required.[457]

[456] *South West Africa case* (n 54) para 101.
[457] ibid.

Gross denial or infringement of rights produces justification for unilateralism. This remains true even where the consent of the offender is legally required. The important aspect of the court's conclusion relates to the impossibility of performance. This aspect is entrenched within the justification for unilateralism. Seeking the cooperation of the offending state reflects an impossibility that demands that a unilateral act be executed. This reasoning would also be applicable to the justification for unilateral conduct under a right to remedial secession. Crucial to this situation is that the unilateral act itself should not be unlawful. Where the execution of remedial secession is manifested via a unilateral declaration of independence for instance, the legitimacy of the declaration would lie in the impossibility of cooperation of the offending state. As long as the unilateral conduct is not unlawful, international law considers it legitimate. Zoller enunciates this presumption in a commentary on the *Lotus case*[458] by stating that:

> It is on this assumption that the *SS Lotus case* came to be regarded by most states as general principle of international behaviour which reads as follows: "Everything which is not prohibited is allowed".[459]

Consequently, Unilateralism in general is not prohibited by international law. Secessionist movements would then have to resort to unilateralism to establish external self-determination. This form of secession has been termed remedial secession. Can this concept which is still part of the traditional approach[460] to secession, be reconciled with a broader legal normative approach?[461] Remedial secession is premised on the morality of secession. Where peoples are linked by some primordial trait, like language or culture and a state denies them the internal territorial expression of this commonality – they could resort to a claim for remedial secession. In this context, Neuberger comments that 'The right of secession is seen as a variant of the right of self-defence – you defend yourself by seceding from an

[458] *Lotus Case (France v Turkey)* [1927] PCIJ Rep Series A No.10.
[459] E Zoller, *Peacetime Unilateral Remedies: An analysis of countermeasures* (Transnational Publishers, Inc. 1984) 7.
[460] The narrow approach perceives the legitimacy of secession and the right to secede to be premise on their moral justification.
[461] In what I termed the normative approach, the right to secede seeks to evolve into a norm of international law which bases the legitimacy of secession on its legal justification.

oppressive system'.[462] He premises this contention on the right to secede being derived from 'democratic principles like the social contract, the consent of the governed, and the right of rebellion'.[463] This contention is noble, but limited. Democratic principles do not by default provide for the protection of minorities and indigenous peoples and their rights. Weller clarifies this point in stating that 'After all, the minority can in principle be consistently outvoted and disenfranchised within the democratic state'.[464]

Remedial secession is premised on the moral justification as plotted by Buchanan with his Remedial Right Only Theory.[465] In the discussion on theories of secession in chapter one, it was held that the Remedial Rights Only Theory proposes that a right to secede comes into existence, in order to provide a remedy of last resort in cases of grave injustices and continuous gross human rights violation. Ryngaert goes on to define remedial secession as 'a secession that borrows its legitimacy from the repressive and illegitimate character of a state that fails to realize a people's right to internal self-determination'.[466] Under the Remedial Rights Only Theory, the abhorrent injustice requirement is the sole qualification for access to a right to secede. However, the theory only serves to assist the moral justification for the use of the rights and falls short of setting out the legal form of the right self. This perspective of remedial secession is representative of the traditional approach to secession. Seshagiri supports this view in stating 'what makes Buchanan's Remedial Right Only proposal attractive is that it tends to accord with global morality as expressed through the prohibitions on serious human rights violations'.[467] Seshagiri also argues for a move away from the traditional approach to what could be argued to be a more normative approach to secession. He suggests that:

> It would seem, therefore, that what is required is an alternative method of conceptualizing self-determination and unilateral secession that accords

[462] B Neuberger, *National Self-determination in Postcolonial Africa,* (Lynne Rienner Publishers, Inc. 1986) 71.
[463] ibid.
[464] Weller,(n 357) 12.
[465] Buchanan, *Justice* (n 69) 350 and Buchanan, 'The Making and Unmaking of Boundaries' (n 70) 246.
[466] Ryngaert, (n 411) 492.
[467] Seshagiri (n 53) 574.

> with the international legal community's fundamental legal principles and ever evolving moral values.[468]

In the Kosovo Opinion, the court briefly referred to a right of remedial secession.[469] The court expressed its view that entering into a debate over the right is beyond the question put to it.[470] The ICJ highlighted the point, that it is not manifestly a concluded fact that remedial secession is reconcilable with self-determination. The court ruled that there exist differences under international law concerning not only the right to self-determination but also a right of remedial secession.[471] Even though the court highlighted the fact that entering into the question of remedial secession is beyond the scope of the question put to it by the General Assembly, three legal questions can be derived from the courts objection. In comparing the principle of self-determination with remedial secession, the court observed that:

> Similar differences existed regarding whether international law provides for a right of 'remedial secession' and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of "remedial secession" were actually present in Kosovo.[472]

The first question directly derived from the quoted objection would be, does international law provide for a right of remedial secession? The secondly, if international law does provide for a right of remedial secession, under what circumstances? The final question would be, were the circumstances that give rise to a right of remedial secession present in the particular case of Kosovo? These questions should have been formally present in the mind of the court. Avoiding a conclusion on them, while it was well within the court's jurisdiction and powers was a missed opportunity for legal certainty.

---

[468] ibid.
[469] *Kosovo case* (n 4) paras 82 and 83.
[470] This is an opinion which has been heavily criticised by international law lawyer and academic alike. See generally Ryngaert (n 411) ; Brewer (n 330).
[471] *Kosovo case* (n 4) para 82.
[472] ibid.

As stated above, remedial secession relies heavily on the moral justification to secede. As indicated above, more than morality is needed for the process of secession to possess legitimacy. A positive right to secede would include a right of remedial secession. Unilateral expression of a right to remedial secession could only find legitimacy within the legal field, if it is a clearly defined right.

5 3 4 Multilateralism

The process of secession naturally involves two or more opposing parties. This begs the question whether the exercise of the right to secede is best served in a bi- or multilateral context. Conversely, is unilateralism an inevitable path for secession? In chapter 3, it is suggested that negotiation be considered as part of the process of secession.[473] This reasoning flowed from the reasoning of the Canadian Supreme court on the presence of a duty to negotiate under their constitution. It was found that such a duty is reconcilable with international law, specifically Article 33 (2) of the UN Charter, which suggests and supports negotiation as a method of settling international disputes.

The problem with negotiation as a solution to secessionist outbreaks is the complex political issues, which often accompanies it. Support for multilateralism needs to be premised on the reality of secession. Contrary to this the secessionists, need also be able to enter into negotiations with the openness to concede to an alternative solution. Parties need to be open to either a recommitment to internal self-determination or the possibility of external self-determination. Orentlicher agrees with this submission in arguing that:

> A commitment to address disputes over separatist claims through negotiated agreements entails two corollary claims. The first is that negotiating partners must accept the possibility of secession as an

[473] See sub-chapter 3 4.

> outcome of their negotiations. The second is that, in general, disputes over separatist claims should not be resolved solely by plebiscite.[474]

Orentlicher ultimately argues for the right to secede. It should be borne in mind that even where a secessionist movement subscribes to bi- or multilateralism via a negotiated claim it only provides for legitimacy of the process. Multilateralism only relates to the process of secession; however, it does not legitimise the right to secede. Consequently, it serves rather to deprive international law of clarity on the boundaries of a right to external self-determination as founded in remedial secession.

5 4 Conclusion

It submitted that unilateralism in general is a normative character of the right to secede. Although multilateral conduct in achieving secession, is a more desired route. The preference lies in the assumption that it will promote peace and stability. This is however an attribute which promotes the recognition of the right to secede, especially in the context of the operation of the tacit principle of stability within international law. The unilateral declaration of independence presents itself as the most efficient and effective mechanism to express unilateral secession. The conclusion reached by the ICJ in the Kosovo Opinion is that international law in general does not prohibit such unilateral declarations of independence.[475] However, it cannot be overlooked that this was a missed opportunity for the ICJ to bring about legal certainty relating to secession.

Under international law, where unilateralism is chosen as a course for secession, intent needs to follow conduct. This relates to the fact that the nature of unilateral conduct should be specific and the declaration needs to intend to bind peoples to

[474] D Orentlicher, 'International Responses to Separatist Claims: Are Democratic Principles Relevant?' in Macedo and Buchanan (n 15) 31.
[475] *Kosovo case* (n 4) para 79.

such unilateral conduct. Cassese remarks, in a commentary on the *North Sea Continental Shelf cases*, that:

> [T]he ICJ stressed that the unilateral assumption 'by conduct, by public statements and proclamations, and in other ways', by a State not party to a convention, of the obligations laid down in the convention was 'not lightly to be presumed', because 'a very definite, very consistent course of conduct' was required.[476]

The current position of the ICJ as presented in the Kosovo Opinion, draws unilateral secession to the fore. Secessionist could become inclined to follow the unilateral route rather than that of negotiating. The research clearly indicates that unilateral conduct is not without legal consequence. The purpose of the declaration of independence is to satisfy the element of recognition, within the process of secession.

A brief inquiry was also undertaken into the potential of a right to secede. It is submitted that the right to secede would be best served within the context of multilateralism as an alternative to unilateralism. This approach is however not without obstacles. The distrust and competing interest of parties not only makes the process increasingly difficult, but complex political issues weigh heavily in on such legal proceedings.

It is concluded that two principles mainly govern the unilateral declaration of independence; firstly, the element of externality and secondly the existence of an underlining legal norm. Three main conclusions can be drawn from the latter. Firstly, a legal right needs to form the basis of the declaration. This lends legitimacy to the declaration, especially in the contexts of the unilateral nature of the act. Secondly, the unilateral character of the declaration does not void it of legal consequences. Finally, because the act carries with it legal consequences,

[476] Cassese, *International Law* (n 286)185.

international law finds application over it. The underlining legal norm that needs to follow a unilateral declaration of independence does not need to be the right to secede exclusively. However the legitimacy of the declaration in it unilateral form depends on this norm.

6 Conclusion and Recommendations

6 1 Introduction

Even undefined and lacking in a concrete theory, secession remains a contentious issue within international law. The legitimacy of the right to secede is at the heart of the controversy. The ICJ in, the Kosovo Opinion, left the debate open. However, the decision made some valuable contributions to unilateral secession in international law. The conclusions of this study are aimed at bringing some clarity to the question of secession as well as the accompanying right. The ever present reality of the status quo of secession is that, the circumstances under which to successfully secede in international law remains largely undetermined.

This research set out to conclude on two questions relevant to international law. The first, whether a legitimate right to state secession exist under contemporary international law and if so, to identify its normative character. The second question sought to establish the current position of the ICJ in the realisation of legal certainty on the right to secede and secession in general. This chapter aims to weave these findings together and provide concrete conclusions on the topics and theories discussed in this work. These two research question furthermore highlighted two approaches to secession. They are the traditional approach and the suggested normative approach, which follow below.

6 2 A Traditional Approach

One of the objectives of this study was to establish a normative premise from which to better comprehend secession. The prescriptive nature of a right to secede needs to be premised on a clear understanding of secession as the conceptual idea. As an example, the inclusion of the right to secede within the Ethiopian constitution is empirically observable; however the utility of the right will be problematic if a court cannot establish what secession actually entails. The presence of the right, without clarity as to the conceptual substance or processes makes it unviable. The traditional

approach to secession is reflective of this uncertainty. It considers secession as a single event, which constantly negates the development of the concept. This results in uncertainty and diverging theories of secession; none of which can either serve as a general theory or contribute substantially to the formulation of a working definition.

This traditional approach is heavily premised on the morality of secession. It considers secession to be a subsidiary notion of international, that cannot challenge or contradict existing norms. The legitimacy of secession is also found within its morality and the ability not to infringe on existing legal concept of international law. The morality of secession then forms the basis for the substantive justification to secede. This is a view proffered by Buchanan.[477] It has curtailed the theoretical development of secession and extinguished its development. The result is that no general theory of secession has been possible to put forward. Morality is a fickle concept, easily vulnerable to changing human sentiments. Inevitably, it will create problems of legal certainty to subject a legal concept or a rights' legitimacy to the requirement of morality. International law needs more than morality to attach legitimacy to a concept. Especially in the context of the development of a concept or right.

Further the traditional approach hampers secession through its perspective on legal personality in international law. The underlying argument throughout this thesis is that legal personality under international law is predominantly influenced by the theories developed within the Westphalian model. This model places the state at the centre of all international legal conduct. The Westphalian model does not allow for different, non-traditional forms of legal personality in international law. The international legal order and the operation of the principle of stability inhibit any development to accommodate new measures of acquiring subject status under international law. This remains the status quo, even in light of the exponential proliferation of non-state actors and even individuals in the field of international law.

[477] See sub-chapter 2 3.

A properly defined normative approach would challenge this traditional approach, but also develop it.

6 3 A Normative Approach

The catalyst to the normative approach is the comprehension that secession is a process and not a singular event. The process of secession, whether unilateral or not, is proposed by Shaw[478] to be organised through the elements of a claim, effective control and recognition. Under a multilateral process of secession, negotiations can be accommodated within the process. This submission is based on the court's reasoning in the *Quebec case*.[479] The court concluded that negotiations were part of the origins of the federal constitution that brought about the state of Canada. Consequently, it developed into a constitutional principle indicating that a decision to alter sovereign border needs to be inclusive of negotiations. The research found that the element of negotiating to settle disputes is well entrenched under international law, most notably within the UN Charter.[480]

The normative nature of a right to secede needs to inform the right's functionality within a particular legal system. Consequently, the approach was to discuss the right from its practical application within international and municipal jurisprudence. The test, as carried out in chapter 3, concluded on the substantive and procedural nature of the right. In contrast to the traditional approach which focussed on the morality of the right; this informed its substantive character. However, this approach pays little attention to the procedural character of the right. The research utilised examples of the right's entrenchment in municipal constitutions to guide the investigation into the extraction of a fully formed right and its contents. This led to the important conclusion, that if a right to secede is included in a constitutional setting this will provide direct access to the right.

[478] See sub-chapter 3 2 1 supra.
[479] See sub-chapter 3 4 supra.
[480] UN Charter, article 33 (2).

A critical question which guided the research in this context was, whether a right to secede found better application within the field of international law or rather municipal law? It is submitted, that secession affects both municipal and international law. However, the new entity which secession establishes would consequently be endowed with right and obligations under international law. This consequence makes international law the most appropriate forum to deal with matters of secession. Where secession is perceived as a process, recognition is one of these elements. The legitimacy which relates to recognition cannot be achieved in the domestic arena only. In so far as international law provides the institutions to confirm the legal personality of states, recognition needs to occur at this level. As an example, Dugard contends that 'Membership to the United Nations is limited to states only.'[481] Membership to the UN is according to Article 4 (which regulates UN membership) of the UN Charter predicated on the possession of legal personality under international law. The inclusion of the right to secede into a municipal constitution produced examples to test the right's legal applicability.

The normative approach presented here has proven to allow for an approach to secession which is more flexible than a pure morally centred approach. This in turn assisted in the harmonisation of the concept itself and the right to secede together with other principles of international law. The findings of this thesis develops two salient facts on the right to secede. Firstly, the right to secede is flexible enough to enjoy recognition alongside other doctrines and principles of international law. It concludes that the right will be not necessarily be void because of conflict with concepts such as territorial integrity, self-determination and uti possidetis. International law does not intend for these concepts to operate unqualified. For example, territorial integrity can only be enjoyed if both internal human right and the territorial integrity of other states' are respected by a particular state. Secondly, the unilateral execution of the right to secede is not without legal consequence. The right to secede would have to form part of some adjacent rights, such as the rights to self-determination and/or independence. A unilateral declaration of independence would then have to provide external expression to the right to secede.

[481] Dugard (n 49) 93.

6 2 Secession

At the heart of secessionist aspirations lies a central paradox. This paradox was presented in chapter one. In order to move away from this paradox, secession needs to develop in a manner that does not place it in conflict with existing doctrines and principles of international law. The traditional approach to secession does not provide answers to this central paradox. A new approach to secession is consequently necessary for the development of the concept.

The first research question, presented two challenges early on during the study. The first was that no general theory of secession existed under international law. The second was that secession was generally approached as a single event rather than viewed as a process. The current concept of secession struggles with multiple and diverging theories which are incoherent in their conceptual arguments and conclusions. The only common agreement amongst theorists is that secession is characterised by the disruption of a state's territorial integrity. A further problem follows the absence of a general theory, this is the absence of a workable definition of secession. The definition followed in this research is reliant on the salient commonalities within the different definitions on this topic.[482] These commonalities represent aspects such as, loss of territory by the dominant state; the presence of the seceding peoples on the territory and the emergence of a new legal entity under international law. Importantly this new entity does not necessarily have to be a sovereign state.[483] It is submitted that that each case of secession presents its own unique challenges, this necessitates an ad hoc approach.

Even if a case by case approach is followed solutions still needs to be provided to the vexing difficulties of establishing a general theory or a common operative definition of secession. The traditional approach has been one of accepting that

[482] See sub-chapter 2 3 supra.
[483] The seceding peoples have the option of form a new sovereign state, integrating with a new state or associating with another sovereign state. See Declaration on Friendly Relations (52).

secession is a singular event. Buchanan represent this approach, which have left the concept of secession unable to develop, primarily because it could not be harmonised within international law. On the opposite side, a normative approach was proposed in this study. This approach sees secession as a legal process. Shaw stands out as the main proponent of this approach. The right to secede then has to relate to the elements of this process of secession. The only attempt at identifying this process is the proposition of Shaw.[484] Shaw's proposition sets the process of secession to include a claim for territory, the establishment of effective control over the territory followed by the plea for recognition of the new entity. This has informed the application of the right to secede throughout the thesis. The traditional approach perceives secession as static rather than a fluid concept. Further, its predominant justification for secession is influenced by moral values rather than legal terms. This approach is prevalent within the reasoning of the theoretical models of secession.

The normative approach perceives secession as a legal process, subjected to compliance with legal theory. In order to present the characteristics of a right, the concept to which that right relates to needs to be clear or at least ascertainable. The inquiry demands more than a mere description of the right, it seeks to conclude on the directives that the right propagates.. The boundaries of the right to secede needs to be framed within the parameters of what the concept of secession allows. The fact that no general theory of secession has been settled, on retards this inquiry.

A distinction is emphasised in this thesis between the normative nature of secession and that of the right to secede. The defined process of secession informs the normative right to secede. The process clarifies the content of the right, and highlights its place within the legal system. However, it seems challenging to include secession as a process under the current international law system especially in relation to statehood. This system still reflects the traditional approach towards secession. Under this approach the old notions of statehood as reflected in the Westphalian model are inflexible and static, but remain entrenched in international

[484] See sub-chapter 3 2 supra.

law. It is accepted that the old established norms, principles and doctrines of international law cannot just be abandoned. Consequently, the approach has to be one of harmonising the right to secede with these established concepts of international law.

The research consequently favours a contemporary approach to secession. This would include respect for the traditional principles and norms of international law. Harmonising the concepts of self-determination and secession, proved to be a less complicated exercise. Self-determination has been elevated to an erga omnes norm of international law. Two forms, internal and external self-determination, exists It is submitted that only in the context of external self-determination can a right to secede succeed. However, access to external self-determination is qualified by initially having to prove the denial of internal self-determination.[485] Not all commentators are in favour of the existence of the right to secede. Some, like Higgins, argue that secession did not survive the decolonisation process.[486] Higgins suggests that 'the concept of secession is irrelevant to the ongoing entitlement of peoples to self-determination in the post-colonial era'.[487] Many of the critics argue that secession is more a political issue than a legal one. Horowitz who is in strong opposition to a right to secede warns that:

> Most theorists of a right to secession have, in this caricatured sense, legal minds. They have generally not concerned themselves with the ethnic politics that produces secessionist claims and that will be affected by new rights to secede.[488]

In chapter 3, the municipal manifestations of the right to secede within constitutions were investigated. Consequently, the research could investigate constitutional inclusions of the right to self-determination. The South African constitution served as one example. The South African constitutional court decided on an interpretation

[485] See sub-chapter 4 2 supra.
[486] Higgins, *Themes and Theories* (n 16) 968.
[487] ibid.
[488] D Horowitz, 'The Cracked Foundations of the Right to Secede' (2003) 14:2 Journal of Democracy 8.

which was different to that present in international law. It is argued that this approach contradicts the constitutional mandate present in the constitution to promote and develop international law.[489] Crawford makes the point in arguing that:

> In principle, self-determination for peoples or groups within the State is to be achieved by participation in its constitutional system, and on the basis of respect for its territorial integrity.[490]

Constitutional participation has to reflect international law, especially where it fundamentally impacts international law or its norms. The same is true for the principle of territorial integrity. The objectives of secession and territorial integrity, immediately leads one to the conclusions that they are incomparability. The research submits two conclusions in this regard. Firstly, the right to respect for territorial integrity is not an unqualified right. The right can be limited in two instances. Where a state does not afford the same right to another state and infringes that state's right to territorial integrity, its own access to the right is suspended. Another instance would be where a state carries out continued and gross human rights violations against its population or a part thereof, then the UNSC has a duty to react. The UNSC must act through any means necessary to comply with its central mandate of maintaining international peace and security available under the UN-Charter. The second conclusion is that territorial integrity is a right available exclusively to states, whereas the right to secede is a peoples' right. The right to secede is consequently much closer related to the protection of human right than the principle of territorial integrity.

Considering the doctrine of uti possidetis, the main findings submitted here, is that this doctrine does not have automatic application in international law. One of the main requirements of uti possidetis is consent. [491] Where peoples utilise the right to secede to form a new entity, such an entity would not be impacted by the doctrine. The entity could not have been part of any past agreements to make the doctrine applicable. This renders the operation of the doctrine impossible against a

[489] Section 39, South African Constitution Act 108 of 1996.
[490] J Crawford, 'State Practice and International Law in Relation to Secession' (1999) 69:1 British Yearbook of International Law 116.
[491] See in general sub-chapter 4 4.4 supra.

secessionist move, because uti possidetis is contractual and premised on agreement or consensus. It is the findings of this research that this concept is not absolute in their operations in international law. It, as with territorial integrity, is subjected to limitations and qualifications under international law. Consequently, the right to secede can be harmonised with these concepts and even find application to strengthen their utility. The uti possidetis doctrine fosters the idea of maintaining peace and stability, but its application has been superficial. The main idea behind uti possidetis was that 'the application of the principle of uti possidetis resulted in administrative boundaries being transformed into international frontiers in the full sense of the term'.[492] However, this doctrine does not factor in the will of peoples or their link to a particular territory. This was enunciated by the court in the *Case Concerning the Frontier Dispute* where it stated:

> The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign.[493]

As much as the first research question ultimately sought to establish the general position of contemporary public international law relating to secession, the second research question sought to further the debate and conclude on a practical legal approach to secession. Towards this end, the second research question was an attempt to find legal certainty based on the authority of the ICJ. This question predominately relied on the judgment of the ICJ in the Kosovo Opinion. From the onset, one major challenge was encountered under this question. The court made it clear that it would not deal with the question of secession, because in its opinion it was beyond the scope of the legal question put to it by the UNGA. However, the reasoning of the ICJ still provided an opportunity to answer the question based on the unilateral declaration. The approach under international jurisprudence has been that unilateral conduct is not without legal consequence. This opened up an opportunity to interrogate the concept of secession within the context of the unilateral

[492] ibid.
[493] *Case Concerning the Frontier Dispute* (n 340) para 23.

declaration of independence. The ICJ confirmed, in the Kosovo Opinion, that a right to independence developed via the right to self-determination during the decolonisation period, this contention was interrogated above.[494] Self-determination seems, in the opinion of the ICJ, to be the legal norm that justifies the declaration of independence.

Further, the theme of unilateral secession was analysed in the contexts of the Kosovo Opinion. The focus was to highlight the competing interests present within the secession debate that might force unilateral conduct. The investigation tested the legitimacy of secession where it was embarked upon unilaterally. The research interrogated the unilateral declaration of independence as a mechanism that drives and gives external expression to the process of secession. One aspect of this process became extremely prominent, the element of recognition. Two requirements were found to be essential to the legitimacy of the declaration. The first was the element of externality and the second the existence of an underlining legal norm. A declaration needs to be an expression to the outside world to satisfy the requirement of externality. Further, in order for the declaration to carry legitimacy, it needs to be based on an underlining legal norm. This can be peoples relying on the right to independence, the right to self-determination or even the right to secede to support their claim.

From these findings no conclusive conclusion can be drawn on the availability under international law of a right to secede. Even though, international law does not expressly prohibit the right. However, the reliance on a positive entitlement towards the achievement of secession is reconcilable with positivist notions present within contemporary international law. The ICJ, in the Kosovo Opinion, indicated that the fact that international law does not find certain conduct to be in violation of international law, does not however create a positive right. The ICJ pressed at lengths that:

[494] See sub- chapter 5 3 2 supra.

> Indeed, it is entirely possible for a particular act such as a unilateral declaration of independence not to be in violation of international law without necessarily constituting the exercise of a right conferred by it.[495]

In summary, the overarching conclusion is that the normative right to secede finds direct application under international law. The research revealed two potential circumstances under which such a right can be available. Firstly, where the right forms part of a municipal constitution and secondly, where a complete denial of basic human rights is perpetrated against peoples, which could be termed remedial secession. Further, the concept of secession is best conceived as a process rather than a single event. Such an approach concludes that a normative approach to secession and the right to secede is favoured. Uncertainty over the determining characteristics of the right to secede, does not render appeals to that right null. The full extent of peoples' access to the right to secede includes unilateral secession. Such unilateral conduct has been proven not to be without legal consequences in international law. International law already recognises a few related rights to the right to secede, like the right to independence and the right to external self-determination. These rights are further available to secessionist movements to use in attaining the result of the right to secede. Based on these finding some related recommendations follow below.

6 4 Recommendations

This thesis reflects two salient and connected facts on secession. The first is, not only is a legitimate right to secede possible under international law, but a legally functional normative right is possible. The second is that the potential of a general right to secede is faced with the practical and politicised challenges of effective control and state recognition. This is reflected in the conclusion of the ICJ in the Kosovo Opinion.

The first, general, recommendation based on the research is that international courts, tribunals and institutions need to recognise that secession and the right to

[495] *Kosovo case* (n 4) para 56.

secede can be harmonised with leading principles and doctrines of international law. Thus it cannot immediately be dismissed, but needs to be tested ad hoc under international law. Secession cannot survive a blanket approach, but a clear prescriptive approach is necessary. As much as a departure from the traditional approach to secession is desired, a normative approach needs to fully consider traditional notions of secession and develop them.

The aspiration for the formulation of a general theory of secession is flawed. The primary reason for this is that too many theoretical variations exist to bring about a unified theory. Further, basing secession only on a moral argument does not forward the development and realisation of the concept as a norm of international law. Rather, secession and more particular the right to secede needs legal justification inclusive of to a moral justification. To equip it with legal functionality the right to secede needs to portray both substantive and procedural legal characteristics.

Finally, international law should reflect the ever-changing landscape of both its legal and practical realities. This advances legal certainty and keeps the law contemporary. The retention of outdated constructs of legal personality does not serve international law to this end. The traditional power base of states has shifted and this compromises the legitimacy of some states' dominium over certain peoples. International law needs to take a human centred approach to statehood and the traditional nation-state. This would include peoples' right to be responsible for their own destinies. The debate towards the realisation of a legitimate right to secede will not be born out of moral themes on secession only, but would be expended to legal approaches as this thesis endeavoured to highlight. The time is ripe for the development of international law in general, but more specifically to bring legal certainty to the question of secession.

.

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
ILM	International Legal Materials
NATO	North Atlantic Trade Organisation
PCIJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards
SAJHR	South African Journal of Human Rights
SFRY	Socialist Federal Republic of Yugoslavia
UN	United Nations
UNGA	United Nations General Assembly
UNMIK	United Nations Interim Administration in Kosovo
UNSC	UN Security Council
USSR	Union of Soviet Socialist Republics

Bibliography

Ablan JR, 'Signal and Affirm: How the United Nations Should Articulate the Right to Remedial Secession' (2012) 45 Vanderbilt Journal of Transnational Law 211 (note)

Ando N, 'Secession or Independence – Self-Determination and Human Rights: A Japanese View of Three Basic Issues of International Law Concerning "Taiwan"' in Arsanjani MH, Cogan J, Sloane R and Wiessner S (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2011)

Arangio-Ruiz G, 'International Law and Interindividual Law' in Nijman J and Nollkaemper A (eds), *New Perspectives on the Divide Between National & International Law* (Oxford University Press 2007)

Barrows J, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002)

Bartkus V, *The Dynamic of Secession* (Cambridge University Press 1999)

Botha H, 'Instituting Public Freedom or Extinguishing Constituent Power? Reflections on South Africa's Constitution-Making Experiment' (2010) 26:1 South African Journal on Human Rights 66

Brandon ME, 'Secession, Constitutionalism and American Experience' in Macedo S and Buchanan A (eds), *Secession and Self-determination* (New York University Press 2003)

Brewer E, 'To Break Free from Tyranny and Oppression: Proposing a Model for a Remedial Right to Secession in the Wake of the Kosovo Advisory Opinion' (2012) 45 Vanderbilt Journal of Transnational Law 245

Brownlie I, *Principles of Public International Law* (7th edn, Oxford University Press 2008)

Buchanan A, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Westview Press 1991)

Buchanan A, *Justice, Legitimacy, and Self-determination: Moral Foundations for International Law* (Oxford University Press 2003)

Buchanan A, 'The Quebec Secession Issue: Democracy, Minority Rights, and the Rule of Law' in Macedo S and Buchanan A, *Secession and Self-determination* (New York University Press 2003)

Buchanan A, 'The Making and Unmaking of Boundaries: What Liberalism Has to Say' in Buchanan A and Moore M (eds), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge University Press 2003)

Budding A, 'Nation / People / Republic: Self-Determination in Socialist Yugoslavia' in Cohen LJ and Dragović-Soso J (eds), *State Collapse in South-Eastern Europe: New Perspectives on Yugoslavia's Disintegration* (Purdue University Press 2007)

Cassese A, *Self-Determination of Peoples: A Legal Reappraisal, Hersch Lauterpacht Memorial Lectures* (Cambridge University Press 1995)

Cassese A, *International Law* (2nd edn, Oxford University Press 2005)

Castellino J, 'National Identity and the International Law of Self-determination: The Stratification of the Western Sahara 'Self'' in Tierney S (ed), *Accommodating National Identity: New Approaches in International and Domestic Law* (Kluwer Law International 2000)

Castellino J, Allen S and Gilbert J, *Title to Territory in International Law: A Temporal Analysis* (Ashgate Publishing 2003)

Chkhikvadze V, *The Soviet State and Law* (University Press of the Pacific 2000)

Christie E, 'Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, ICJ Advisory Opinion of 22 July 2010, General List No. 141', Australian International Law Journal, Case Note 212 (note)

Crawford J, 'State Practice and International Law in Relation to Secession' (1999) 69:1 British Yearbook of International Law 116

Crawford J, 'Report by James Crawford: "State Practice and International Law in Relation to Unilateral Secession"' in Bayefsky A (ed), *Self-determination in International Law: Quebec and Lessons Learned* (Martinus Nijhoff Publishers 2000)

Crawford J, 'The Right to Self-determination in International Law: Its Development and Future' in Alston P (ed.), *Peoples' Rights* (Oxford University Press 2001)

Crawford J, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007)

Danspeckgruber W, 'Self-determination and Regionalization in Contemporary Europe' in Danspeckgruber W (ed), *The Self-determination of Peoples: Community, Nation, and State in an Interdependent World* (Lynne Rienner Publishers 2002)

Doyle M, 'The United Nations and National Self-determination: The New Interventionism and an Internationalist Alternative' in Danspeckgruber W and Watts A (eds), *Self-determination and Self-administration: A Sourcebook,* (Lynne Rienner Publishers 1997)

Dugard J, *International Law: A South African Perspective* (4th edn, Juta 2012)

Efevwerhan D, 'Kosovo's Chances of UN Membership: A Prognosis', (2012) 4 Goettingen Journal of International Law 93

Franck T, *Fairness in International Law and Institutions* (Clarendon Press 1995)

Gans C, *The Limits of Nationalism* (Cambridge University Press 2003)

Groarke P, *Dividing the State: Legitimacy, Secession and the Doctrine of Oppression* (Ashgate Publishing 2004)

Habtu A, 'Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution' (2005) 35:2 Publius 313.

Harding C and Lim CL, 'The Significance of Westphalia: An Archaeology of the International Legal Order' in Harding C and Lim CL (eds), *Renegotiating Westphalia: Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (Martinus Nijhoff Publishers 1999)

Harris D, *Cases and Materials on International Law* (6th edn, Sweet & Maxwell 2004)

Hazewinkel H, 'Self-determination, Territorial Integrity and the OSCE' (2007) 18:4 Helsinki Monitor: Security and Human Rights 289

Henkin L, Pugh RC, Schachter O and Smit H, *Basic Documents Supplement to International Law: Cases and Materials,* American Casebook Series (3rd edn, West Publishing Company 1993)

Higgins R, *Problems and Process: International Law and how we use it* (Claredon Press 1994)

Higgins R, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (vol. 2, Oxford University Press 2009)

Horowitz D, 'A Right to Secede' in Macedo S and Buchanan A, *Secession and Self-determination* (New York University Press 2003)

Horowitz D, 'The Cracked Foundations of the Right to Secede' (2003) 14:2 Journal of Democracy 8

Howse R and Teitel R, 'Humanity Bounded and Unbounded: The Problem of State Borders and the Normative Regulation of Self-Determination and Secession in International Law',
http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__academics__colloquia__legal_political_and_social_philosophy/documents/documents/ecm_pro_070132.pdf
(working paper)

Janis M and Noyes J, *Cases and Commentary on International Law* (West Publishing Company 1997)

Johanson M, *Self-Determination and Borders: The Obligation to Show Consideration for the Interest of Others*, (Åbo Akademi University Press, 2004)

Johnston R, Knight D and Kofman E (eds), *Nationalism, Self-determination and Political Geography* (Croom Helm Ltd 1988)

Jovanovic MA, 'Can Constitutions be of Use in the Resolution of Secessionist Conflicts?' (2009) 5:2 Journal of International Law and International Relations 59

Koskenniemi M, 'National Self-determination Today: Problems of Legal Theory and Practice'. (1994) 43:2 International and Comparative Law Quarterly 245

Koskenniemi M, *From Apology to Utopia: The structure of international legal argument* (Reissue with a new Epilogue, Cambridge University Press 2005)

Lalonde S, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (McGill-Queen's University Press 2002)

Levitt JI (ed), *Africa: Mapping New Boundaries in International Law* (Hart Publishing 2008)

Macedo S and Buchanan A, *Secession and Self-determination* (New York University Press 2003)

Michelman F, 'Can Constitutional Democrats Be Legal Positivists? Or Why Constitutionalism?' (1996) 2:3 Constellations 293

Miller D, 'Secession and the Principle of Nationality' in Moore M (ed), *National Self-determination and Secession* (Oxford University Press 1998)

Miller D, *National Responsibility and Global Justice* (Oxford University Press 2007)

Moscotti A, *Burma's Constitution and Election of 1974: A Source Book*, (Research Notes and Discussions Series No. 5, Institute of Southeast Asian Studies 1977)

Musgrave T, *Self-Determination and National Minorities* (Clarendon Press 1997)

Neuberger B, *National Self-determination in Postcolonial Africa,* (Lynne Rienner Publishers 1986)

Norman W, 'Domesticating Secession' in Macedo S and Buchanan A, *Secession and Self-determination* (New York University Press 2003)

Orentlicher D, 'International Responses to Separatist Claims: Are Democratic Principles Relevant?' in Macedo S and Buchanan A, *Secession and Self-determination* (New York University Press 2003)

Radan P, 'The Definition of 'Secession'' (2007) 3 Macquarie Working Law Paper Series <http://ssrn.com/abstract=1011833>

Ratner S, 'Drawing a Better Line: Uti Possidetis and the Borders of New States' (1996) 90:4 American Journal of International Law 590

Pham J, 'African Constitutionalism: Forging New Models' in Levitt JI (ed), *Africa: Mapping New Boundaries in International Law* (Hart Publishing 2010)

Roach S, 'A Constitutional Right to Secede? Basque Nationalism and the Spanish State' (2007) 8:4 International Studies Perspectives 446

Roth B, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11:2 Melbourne Journal of International Law 1

Ryngaert C, 'The ICJ's Advisory Opinion On Kosovo's Declaration of Independence: A Missed Opportunity?: International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010' (2010) 57:3 Netherlands International Law Review 489

Seshagiri L, 'Democratic Disobedience: Re-conceiving Self-determination and Secession at International Law' (2010) 51 Harvard International Law Journal 553

Shaw M, *Title to Territory in Africa: International Legal Issues* (Clarendon Press 1986)

Shaw M, *International Law* (5th edn, Cambridge University Press 2003)

Silverstein J 'Politics in the Shan State: The Question of Secession from the Union of Burma' (1958) 1:1 Journal of Asian Studies XVII 43

Summers J, *Peoples and International Law: How Nationalism and Self-determination Shape a Contemporary Law of Nations* (Martinus Nijhoff Publishers 2007)

Unger A, *Constitutional Development in the USSR: A Guide to The Soviet Constitutions* (Methuen Publishers 1981)

Van Der Beken C, *Unity in Diversity – Federalism as a Mechanism to Accommodate Ethnic Diversity: The Case of Ethiopia*, (LIT Verlag GmbH 2012)

Wallace R and Martin-Ortega O, *International Law* (6th edn, Sweet & Maxwell 2005)

Webb MJ, 'Is there a Liberal Right to Secede from a Liberal State?' (2006) 10:4 TRAMES: A Journal of The Humanities & Social Sciences 371

Webb W, 'The International Legal Aspects of the Lithuanian Secession' (1991) 17 Journal of Legislation 309

Weller M, *Escaping the Self-determination Trap* (Martinus Nijhoff Publishers 2008)

Weller M, *Contested Statehood: Kosovo's Struggle for Independence,* (Oxford University Press 2009)

Weller M, 'Why the Legal Rules of Self-Determination do not Resolve Self-Determination Disputes' in Weller M, Metzger B and Johnson N (eds), *Settling Self-determination Disputes: Complex Power-Sharing in Theory and Practice* (Martinus Nijhoff Publishers 2008)

Weeramantry C, *Islamic Jurisprudence: An International Perspective* (Macmillan 1988)

Winter RC, *Blueprints for Independence: The New States and Their Constituting Instruments* (Djambatan N.V. 1961).

Zoller E, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Transnational Publishers, Inc. 1984)

Index of Cases:

International Court of Justice

Nuclear Test Case (Australia v France) (Judgment) General List No. 58 [1974] ICJ Rep

Right of Passage over Indian Territory (Portugal v India) (Merits) [1960] ICJ Rep 6

Sovereignty over Certain Frontier Land (Belgium v Netherlands) (Order) General List No. 38 [1959] ICJ Rep

Temple of Preah Vihear (Cambodia v Thailand) [1962] ICJ Rep 6

Territorial and Maritime Dispute (Nicaragua v. Colombia) [2012] ICJ (pending case) www.icj-cij.org/docket/index.php?=p1=3&p2=1&code=&case=124&k=e2

Western Sahara (Advisory Opinion) [1975] ICJ Rep 12

Permanent Court of International Justice

Lotus Case (France v Turkey) [1927] PCIJ Rep Series A No.10

Nationality Decrees in Tunis and Morocco [1923] PCIJ Rep Series B No.4

African Commission on Human and Peoples' Rights

African Legal Aid v The Gambia [2000] AHRLR 119 (ACHPR 2000)

Katangese Peoples' Congress v Zaire [2000] AHRLR 72 (ACHPR 1995)

European Court Of Human Rights

Alisic and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The Former Yugoslavia Republic of Macedonia" Judgement (Merits) No. 60642/08 ECHR

Ilascu and Others v Moldova and Russia (General Council) No. 48787/99 ECHR

Catan and Others v The Republic of Moldova and Russia (General Council) No. 43370/04 ECHR

Inter-American Court Of Human Rights

Jaime Francisco Castillo-Petruzzi v. Peru, *Judgment* (IACtHR) 04 September 1998

Miguel Castro Castro Prison v. Peru, Judgement (IACtHR) 02 August 2008

National Courts

Canada

Reference Re Secession of Quebec [1998] 2 S.C.R. 217

South Africa

S v Makwanyane 1995 (3) SA 391 (CC)

In Re: Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)

Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)

Government of the Republic of South Africa v Grootboom 2001(1) SA 46 (CC)

Jafta v Schoeman and Others; Van Rooyen v Stoltz 2005 (2) SA 140 (CC)

Kaunda v President of the Republic of South Africa 2005 (4) SA 235 (CC)

International Law Index

Åland Island Case (1920) League of Nations Official Journal Spec Supp 3

Island of Palmas Case (United States v Netherlands) [1928] 2 R.I.A.A. 829

Montevideo Convention on the Rights and Duties of States (Inter-America) (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19

United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat. 1031

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat. 1031

Inter-American Treaty of Reciprocal Assistance (adopted 02 September 1947, entered into force 03 December 1948) OASTS No. 8 (Rio Treaty)

Universal Declaration of Human Rights (adopted 10 December 1948) GA res. 217A (III)

The Declaration on the Granting of Independence to Colonial Countries and Peoples, (adopted 14 December 1960) GA res. 1514 (XV)

Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter (adopted 15 December 1960) GA res. 1541 (XV)

Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of States and Government held in Cairo, UAR, from 17 to 21 July 1964 (1964) AHG/res.16(I)
www.au.int/en/sites/default/files/ASSEMBLY_EN_17_21_JULY_1964_ASSEMBLY_HEADS_STATE_GOVERNMENT_FIRST_ORDINARY_SESSION.pdf

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (adopted 24 October 1970) GA res. 2625 (XXV)

Questions considered by the Security Council at its 1606th, 1607th and 1608th meetings on 4, 5. And 6 December 1971 (adopted 7 December 1971) GA res. 2793 (XXVI)

New member: Bangladesh (adopted 10 June 1974) SC res 351

Admission of the People's Republic of Bangladesh to membership in the United Nations (adopted 17 September 1974) GA res. 3203 (XXIX)

Conference on Security and Co-operation in Europe Final Act, Helsinki, 1975 (adopted 01 August 1974) 14 ILM 1292 (1975)

The so-called independent Transkei and other Bantustans (adopted 26 October 1976) GA res. 31/6A

Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169) [adopted 27 June 1989, entered into force 05 September 1991] 28 ILM 1382 (1989)

The European Community Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, (1992) 31 I.L.M. 1485

Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, (Banditer Commission) [1992] 31 I.L.M. 1491.

United Nations General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nation (adopted 9 November 1995) GA res. 50/6

Kosovo (adopted 10 June 1999) SC res. 1244

Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (adopted and entered into force 12 December 2000) 40 ILM 260 (2001)

The United Nations Declaration on the Rights of Indigenous Peoples (adopted 12 September 2007) A/61/L.67/Annex

Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law (adopted 8 October 2008) GA res. 63/3

Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, ICJ (Advisory Opinion) [2010] Written Statement of the Government of the Republic of Serbia <http://www.icj-cij.org/docket/files/141/15642.pdf>

National Law Index

The Law on the Special Legal Status of Gagauzia, 23 December 1994, http://www.intstudies.cam.ac.uk/centre/cps/documents_moldova_law.html

The Constitution of the Union of Burma (1947) adopted on the 24th day of September 1947.

http://www.blc-burma.org/html/Constitution/1947.html#RIGHT OF SECESSION

Supreme Court Act, R.S.C., 1985, c. S-26. (Canada)

Constitution of the Federal Republic of Ethiopia (8 December 1994) in 1995 (1) Negarit Gazeta 55

The Falklands Islands Constitution Order 2008; www.falklands.gov.fk/assembly/documents/The%20Falklands%20Islands%20Constitution%20Order%202008.pdf0

Constitution of the Republic of South Africa, Act 108 of 2006.

Other Sources:

Amnesty International 2009 Report on 'State of the World's Human Rights': http://report2009.amnesty.org/en/regions/asia-pacific/myanmar

Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Eritrea-Ethiopia Boundary Commission (13 April 2002) www.unhcr.org/refworld/docid/4a54bbec0.html

Dion S, *'Chaos and dangers would follow a unilateral declaration',* Canadian Speeches July-August 1997; 16-17. <http://go.galegroup.com/ps/i/do?id=GALE%7CA30458805&v=2.1&u=27uos&it=r&p=AONE&sw=w>

Websites:

www.icj-cij.org/documents

http://hudoc.echr.coe.int

www.pca-cpa.org/ENGLISH/RPC/EEBC/E-E%20Agreement.html

http://www.ilo.org

http://www.electionethiopia.org/en/political-parties.html